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ABSTRACT

Part of the National Paralegal Institute's curriculum for short-term intensive training sessions for paralegals, or legal assistants, the document outlines the format for training sessions concerning: (1) initial training to examine the functions of the paralegal and stimulate commitment to the entire training program, (2) legal research, (3) central ethical problems inherent in the paralegal role, and (4) unauthorized practice of law. The legal research session consists of an introduction to the structure of the legal system by the instructor and the step-by-step approach to a sample research problem. Advocacy and professional responsibility include American Bar Association restrictions on advertising, solicitation, and confidentiality and the resolution of conflicts between the advocate's duty to represent the client's viewpoint and the advocate's own principles and other responsibilities. The session on unauthorized law helps to provide trainees with an understanding of the nature of unauthorized practice limitations and possible office procedures to use in averting unauthorized practice charges. An outline of the argument on three counts and the major substantive points which might be raised are included. The concluding section suggests effective teaching techniques for paralegal training. (EA)

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GENERIC TRAINING MATERIALS

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Roles of Paralegals

A. Purpose of the Session

The Roles of Paralegals is a very important session in the training program. The session is usually scheduled after an introduction to the entire training program. In the roles session, the paralegals will be trying to interpret what is expected of them at the training, the method and quality of the teaching, and their own functions in the training session. This is the first opportunity for the paralegals to discuss their jobs, training and experience in a working session. Thus, the roles session should aim to accomplish the following:

1) Provide the paralegals with useful information and insights. At the end of the session they should feel that they have learned facts and points of view of importance to them. The session must be more than an open discussion of the roles of paralegals.

2) The paralegals should be drawn into the discussion, have an opportunity to describe their functions and express their views. Efforts should be made to insure that each paralegal actively participates, since this induces involvement and interest at an early stage in the training.

If the paralegals assemble on the evening before the first day, the introduction normally is given in the evening, and the roles session is the first one in the morning of the following day.

B. Participants in the Session

The session should be led by two trainers, at least one of whom is a paralegal. The second trainer should probably be the director of the training program. This lends some weight and importance to the first session. The Institute normally excludes all other trainers and non-paralegal observers from the session for two reasons. First, the paralegals have not been together previously and should not be distracted by the presence of others who are not part of the paralegal training group; and, second, the presence of outsiders often inhibits freedom of expression.

The discussion leaders in this session should never be the supervisors of the paralegal participants.

C. Components of the Session

The session is normally composed of four parts:

1. Introductions (15-20 minutes)
2. Background of the paralegal movement (15-30 minutes)
3. Functions of paralegals
4. Summary (5 minutes)

The Institute normally allows two to three hours for the roles session when there are between twelve and twenty-four trainees. Ideally, this session could run four hours.

D. Suggestions for Content of the Components

1. Introductions

The session should begin by going around the room and having the paralegals identify themselves, their offices, and briefly what they do. This loosens their vocal cords helps them get to know each other better, and gives the trainers a sense of the kinds of working experience represented in the group. The trainers should also clearly identify themselves.

2. Background of the Paralegal Movement

This part of the session is essentially informational. It is aimed at opening the paralegals' minds to the extent of the national paralegal movement. Many Legal Services paralegals are not familiar with this movement, and feel isolated and uncertain about their occupational status. For this reason, we normally present about fifteen to thirty minutes of basic information on some of the following subjects:

a) the number of paralegals in the country (estimated to be about 70,000);

b) the number of training programs around the country (estimated to include about 70 universities and community colleges) and the fact that most are aimed at private law training;

c) activities of the ABA through its Special Committee on Legal Assistants, and activities of local bar associations, if significant;

d) discussion of the ABA Guidelines for Paralegal Training, and of the accreditation, certification, and licensing concepts. This should include some participation by paralegals about the meaning of accreditation and certification, and their

views on and knowledge about developments in these areas.*

While this part of the session is principally informational, it may generate considerable discussion on the part of the paralegals, which should be allowed to proceed freely. In this session the paralegals often decide that they should work collectively to prevent bar association control of the paralegal movement. Particularly where paralegals are drawn from a well-defined region, the camaraderie and mutual interests developed during the training session may inspire the paralegals to form some kind of paralegal association or communications network; however, the trainers should not initiate this.

3. Functions of Paralegals

This part of the session may be run in a number of ways. Its purpose is to get the paralegals to consider the kind of work they now do; the kind of work that paralegals around the country, particularly in OEO Legal Services, are doing; the different possible structures and functions of Legal Services offices using paralegals; paralegals' relations with lawyers; and the various merits and defects of certain kinds of paralegal work.

It is important to generate and focus discussion. Following are several ways this can be done.

*ABA publications can be obtained from the Special Committee on Legal Assistants, 1155 East 60th Street, Chicago, Illinois, 60637.

The trainer may lay out and describe the three basic paralegal functions of intake interviewer, generalist, and specialist and how these roles may vary depending on the individual office situation. For example, in a highly specialized project, the intake interview may serve two functions, determining financial eligibility, and directing the client to the appropriate specialty unit. This could easily be done by the receptionist or a secretary. The comprehensive initial fact-gathering would then be done by an attorney or a paralegal trained in that particular specialty area. However, if the purpose of the intake interview, after an eligibility determination, is to delve into the substance of the client's problem, the interviewer needs to know a wide range of law in order to ask the right questions. In this situation, which is most common in Legal Services offices, perhaps the intake interviewer should be the most knowledgeable person in the office. Perhaps a lawyer should be responsible for intake and determining if the case should be referred to a paralegal. A lawyer doing general intake is in a better position to spot potential problems and issues requiring litigation. The fact that the client sees an attorney at the initial interview also clearly establishes a direct relationship between the attorney and the client.*

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*The importance of this relationship is dealt with in the Institute's trainers manual for a separate course on unauthorized practice of law.

The Institute tends to believe that the use of paralegals as intake interviewers is generally dysfunctional. Few paralegals have been trained to be knowledgeable in a wide vareity of legal areas, and as a result it is difficult for them to conduct effective intake interviews. Also, the intake interview function often precludes doing other work, and thus paralegals are limited to interviewing and cannot handle their own cases.

Similar problems arise for the generalist, if it means that the paralegal must be prepared to handle any and all kinds of cases.

Legal Services paralegals are now more frequently specialists. This has always been the case in the private law sector. Without forcing the discussion, it is likely that the paralegals will conclude that the highest form of paralegal function is as a specialist.

Paralegals should also be invited to consider their relations with lawyers. This tends to focus on the differences in training, knowledge, skills, and functions. Sometimes hostility against lawyers appears, although it is our experience that almost all paralegals report having good relationships with the attorneys with whom they work. The purpose of this discussion is not to dwell on personal grievances, but rather to explore the real difference between what lawyers can do best, versus paralegals' appropriate functions.

At this juncture, it may be useful to place on the blackboard every conceivable job that a paralegal may do, including such matters as legal research, investigation, intake interviewing, fetching coffee, filing papers, serving documents, handling administrative hearings, etc. The list should include both the desirable and undesirable activities.

It is then possible to rate these functions in terms of desirability and appropriateness. We suggest a plus sign for the desirable and appropriate activities, and a minus sign for those undesirable and inappropriate, and a zero for activities which are reasonably performed by paralegals, but should not be primary. (We recommend not attempting to classify the functions in a more refined way, such as on a scale from 1 to 10.)

Once this exercise is concluded, the paralegals will see before them a functional definition of the paralegal. If time permits, it is then enlightening to run through the same functions, using the same classification system, but for lawyers. The result of this exercise is the discovery that both paralegals and lawyers may and should do very similar things.

4. Summary

One purpose of this session is to get paralegals in the right frame of mind for committing themselves to the entire training program. It is almost inevitable that paralegals will conclude that training is essential to their work and that they cannot aspire to more responsibility and higher status unless they have considerable knowledge about the law and skills of dealing with legal cases. Thus, this session can represent a dramatic increase in whatever commitment the paralegals bring to work hard during the training session.

Legal Research

Background and Goals

An important part of the planning of the National Paralegal Institute's curriculum involved discussions with paralegals around the country to determine in what areas they felt a need for training. Over and over again, there was expressed the desire for a course in legal research. It was largely because of such direct requests from paralegals that legal research was included in the curriculum.

Legal research is a relatively complicated topic in which one gains proficiency only through practice. Clearly no one can learn how to do legal research in two hours. The goals of this session are tailored to these realities.

The first goal is to break down some of the fear and intimidation many paralegals feel about the law library. Often, there is an almost mystical aura about "the law". It is somehow hidden in the lawbooks which only lawyers know how to use. In this course, the paralegals are shown that there is no magic about the library. Rather, it is a tool which they can learn to operate. Even if they are not called upon to do legal research in their projects, the course helps to reduce the disparity many of them perceive between their knowledge of the law and that of lawyers. It increases their sense of professional competence to feel that they have access to the same resources that the lawyer has.

The goals of this course are more than psychological, however. Equally important is familiarizing the paralegals with the more commonly used legal resources such as codebooks, reporters and Shepard's. By working through a model problem they learn what kinds of information can be found in the various types of lawbooks and how the books are used to get at the information. They also gain a sense of how the different resources relate to each other. At the end of the course, they probably will not be able to research a legal question on their own. But, they will know what a citation is. They will be able to look up a statute and understand why they should check the pocket part. They will know the reason why they might be asked to shepardize a case. The goal of the course is to give the paralegals an overview of the subject and to equip them to do certain relatively simple kinds of legal research such as these.

The trainer should be conscious of the fact that a tremendous amount of material is being presented in a very short time in this course. She/he should make clear to the paralegals at the outset exactly what the goals of the course are and are not. Also, the trainer should let the paralegals know that she/he finds legal research a complicated subject and that if they get confused at any point they should not hesitate to ask questions or seek further explanations. It is the responsibility of the trainer to see that the paralegals are not overwhelmed by the amount of information conveyed during the session.

Format and Materials

The course is divided into two parts: an introduction to the structure of the legal system by the instructor and working through a sample research problem by the paralegals with the instructor's guidance. Experience has shown that it is vitally important to have copies of the following books: U.S.C.A. Gen. Index S-T; 42 U.S.C.A. §§406-1399 (both with up-to-date pocket parts to 1974); 45 C.F.R. Parts 200-499 (Revised as of October 1, 1972); 404 U.S.; and Shepard's United States Citations. It is also important to have copies of the following: the chart from 2 C.F.R. that contains 42 U.S.C. 606; 38 F.R. 26916; and the cover page and the introduction and pp. 124-125 from CFR Sections Affected Annual 1973, Volume 38, Nos. 1-248. It is essential that each paralegal have the opportunity to physically use the books during the session. This can be accomplished by having one copy of each book for every two paralegals. When photocopies of particular pages are used, each paralegal should be given a copy. Without this concrete experience, the concepts of legal research are extremely difficult to grasp. Actually using the books illustrates the trainer's instructions and gives the paralegals a greater sense of accomplishment and confidence.

Other typewritten materials are distributed throughout the course. These will be discussed below at the appropriate points.

Structure of the Legal System

Before familiarizing themselves with the various books they use in working on the Peterson problem, the paralegals must first become somewhat familiar with the structure of the legal system. This part of the course, which should take about half an hour, consists mainly of a lecture by the trainer on the legislative and judicial bodies of both the federal and state systems.

The chart entitled Statutes should be distributed as a reference sheet for the discussion of legislatures. It is very helpful for the trainer to use concrete examples in this explanation. Welfare laws can be used to illustrate how the various legislative levels relate to each other. The discussion might be something like the following:

> In 1935 the United States Congress in Washington, D.C. decided to set aside money to be distributed by the states to certain categories of people such as the aged, disabled, blind, and dependent children. So they passed a federal law (one which applies to all the states) stating, in general terms, how they wanted the money to be used. Federal laws are published in a set of books called the United States Code Annotated (here hold up the book). They then passed the money on to the Department of Health, Education, and Welfare and gave HEW the power to make additional, more detailed rules about how the money should be distributed. These rules, called regulations, however, may not conflict with Congress' original intentions. So, HEW then passed regulations which are published in a set of books called the Code of Federal Regulations. (here hold up the book).

The discussion then continues through the state levels in basically the same manner.

It is important for the trainer to keep in mind that this is not a lecture on welfare law. Rather it is an illustration of the skeleton of the legislative system in this country and the books in which statutes and regulations are found. Do not become bogged down in the complexities of the substantive law. Keep the example as simple as possible. Also, it is a useful teaching aid to write each level on the blackboard as it is discussed. As a book such as U.S.C.A. is shown to the group, the abbreviations and citations should be written on the blackboard. Give the group a chance to decipher a few examples.

The discussion of the judicial system should begin with the distribution of the chart on the court systems. Some explanation of the differences between federal and state courts should be given but it is not necessary to delve too deeply into this area. Again, the use of an example will help to make the relationship of the courts clearer.

> Assume that two people from different states have a car accident and one decides to sue the other. They go to the Federal District Court which is the first level of federal courts. The judge makes a decision and he may write out the reasons for his decision in an opinion. Opinions of judges in Federal District Court are published in books called the Federal Supplement. (Explain what the citation means). Now suppose the person who lost believes the judge made the wrong decision. He may ask the judges at the next level, the United States Circuit Court of Appeals, to review the case. They then make a decision which is published in the Federal Reporter.

The discussion then continues through the United States Supreme Court. A similar example can be used to explain the State courts

and reporters. It is helpful to show the state and federal systems as parallel, with the Supreme Court as the final decision maker in both systems.

This section on the structure of the legal system can be referred to again later in the course as the paralegals begin to use the books. While it may seem elementary and simple to those who have had legal training, the instructor should keep in mind that most lay people have never been exposed to this information in any systematic way and so the explanations should be as clear and uncomplicated as possible. Sample citations are given on the handout sheet. These should be explained element by element.

Research Problem

This section of the course involves the trainer leading the paralegals step by step through a research problem. It should fit reasonably well into the remaining hour and a half.

The first handout is the statement of Mrs. Peterson's problem:

> Mrs. Peterson has been receiving AFDC payments of $190 per month. She has just received a notice indicating that her payments will be terminated because her only child is 18 years old and no longer is considered a dependent child under the Regulations of the State of Independence Department of Welfare. Mrs. Peterson's daughter is attending a local college half-time (9 semester hours) and is employed part time.

In order to bring the legal issue into focus, the instructor should tell the paralegals that the question with which they should be concerned is whether an 18 year old student who is going to college half-time and working part-time is a dependent child within the statutes and regulations. The paralegals should be given the State of Independence regulation which says that only full-time students are eligible.

Having this regulation allows the trainer and paralegals to explore the methods of legal research. The purpose of the course is to show what resources are used to arrive at an answer. The following is an outline of the various steps that the paralegals will take in researching this issue. They should be made aware that there is no one single way to approach a problem. What follows is simply one of many possible ways of doing research designed especially to allow them to use several different resources. As they do more legal research, they will develop their own methods which are just as valid as this one using the resources available to them.

1) Explain to the paralegals that the first step is to check the regulation cited by the Welfare Department to be sure that it says what they say it does.

2) Explain that one strategy for attacking the Welfare Department's action is to find a federal law or regulation which states that 18 year old half-time college students can be considered dependent children. This refers back to the discussion earlier of the necessity of conformity of state regulations with federal law.

3) Distribute copies of U.S.C.A. Gen. Index S-T and explain what an index is and how it is used. This particular volume is used because welfare laws are part of the Social Security Act. Allow the paralegals a few minutes to check through the index on their own and then direct their attention to the subheading: Dependent child, defined 42 §§607,608. Explain what this means. (This is only one of several subheadings which lead eventually to the same section).

4) Explain the pocket part and how to use it.

5) Distribute copies of 42 U.S.C.A. §§ 406-1399. Have someone read aloud §607 a-2. This section refers them back to §606-a.

6) Before reading §606-a, explain the layout of the statute i.e., the main body of the statute, the historical note, and the notes of decisions.

7) Have someone read aloud §606-a. This leaves open the question of whether "regularly attending" includes half-time attendance. Check §606-a in the pocket part.

8) Explain that the courts may have interpreted what "regularly attending" means. The notes of decisions under §606 in the pocket part contain a reference to Townsend v. Swank, 404 U.S. 282, 92 S.Ct. 502, 30 L. Ed. 2d 448, which may contain a helpful interpretation.

9) Distribute copies of 404 U.S. and direct the paralegals to page 282. Explain the layout of the case i.e., parties, headnotes, opinion. It would be too time-consuming to have the paralegals read the whole opinion in class. So simply explain that the case deals with full-time college students and does not address the issue of half-time students.

10) Even though the case is not particularly helpful, it is a good chance to show the group how to use Shepard's. Distribute copies of Shepard's Citations and explain how to shepardize Townsend v. Swank. There is not time to discuss more than the basic structure and the most common abbreviations.

11) Explain that the next step would be to find any federal regulations on the subject. Distribute copies of Title 2 of the C.F.R. (or xerox copies of page 94 if the books are not available). Explain how to use the Parallel Table. Explain that since this index is far from perfect, it is necessary in doing a good research job to read through all of the regulations published pursuant to 42 U.S.C.A. §§601-608 which deal with A.F.D.C. Explain that given the time constraints, and the available books, you will direct them to the appropriate section.

12) Distribute copies of 45 C.F.R. parts 200-499 and direct the paralegals' attention to part 233.90-vi. This part deals with "regularly attending a school, college, or university" but it does not mention half-time students.

13) Distribute copies of the list of CFR Sections Affected for 1973 and explain how it is used. Checking 45 C.F.R. part 233.90 should lead to a reference to 26916. Explain how this relates to the Federal Register.

14) Distribute copies of the appropriate issue of the Federal Register or xeroxed copies of Page 26916. This contains regulations effective November 26, 1973 which deal with the issue of the eligibility of half-time college students for AFDC.

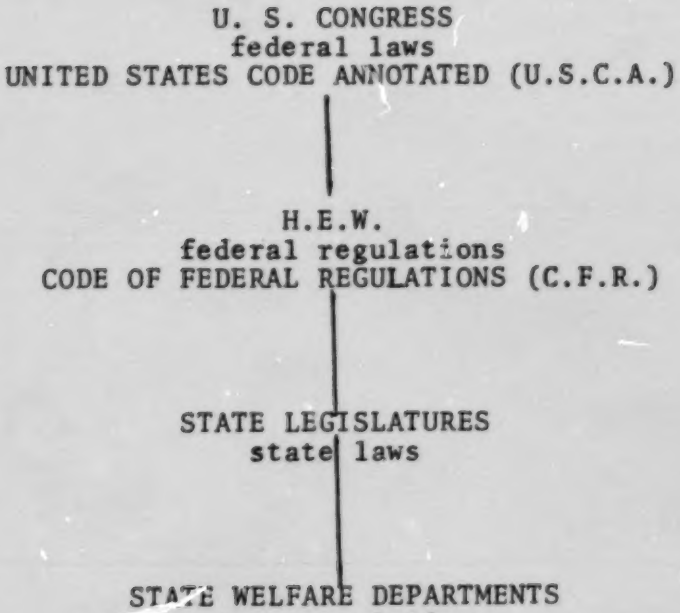
Experience has shown that at this point the paralegals feel some sense of accomplishment at having found the answer but they also feel that they could not possibly do that kind of research on their own. The instructor should distribute the sheets entitled "One Way to Approach Mrs. Peterson's Problem". This retraces each step that was taken during the class in researching the problem. The paralegals should be encouraged to work through these steps again when they return to their offices. This will reinforce what they have learned about the different books and also give them a better feel for the relationships of various resources to each other. The assumption in the Peterson problem as worked out in this course is that the research is being done in January, 1974. If the paralegals were to pursue the problem in current source books, the approach and answer might be different.

A final handout sheet, entitled Legal Resources, describes the contents of some research tools. It is also useful to distribute copies of West's Law Finder, A Legal Research Manual available free from West Publishing Company in St. Paul, Minnesota.

The key to teaching legal research is simplicity. State each proposition carefully - wait for it to sink in - repeat it if necessary. Do not rush into side matters or try to teach all of legal ersearch.

We have found that this course was viewed by most paralegals to be the single most interesting session in the training. This results, we believe, from the simple and step-by-step approach which convinces them that they have learned a definite quantity of information.

STATUTES


U. S. CONGRESS
federal laws
UNITED STATES CODE ANNOTATED (U.S.C.A.)
H.E.W.
federal regulations
CODE OF FEDERAL REGULATIONS (C.F.R.)
STATE LEGISLATURES
state laws
STATE WELFARE DEPARTMENTS
state regulations

COURT SYSTEM

UNITED STATES SUPREME COURT

United States Reports - Goldberg v. Kelly et al.
396 U.S. 254 (1970)
Supreme Court Reporter - 90 S. Ct. 1011 (1970)
Lawyer's Edition - 25 L.E. 2d 237 (1970)

FEDERAL COURT SYSTEM

UNITED STATES COURTS OF APPEALS
Federal Reporter - Javins v. First National Realty Corp.
428 F. 2d 1071 (D.C. Cir. 1970)

UNITED STATES DISTRICT COURTS
Federal Supplement - Kelly et al. v. Goldberg
294 F. Supp. 893 (S.D.N.Y. 1968)

STATE COURT SYSTEM

STATE SUPREME COURT
West Virginia State Bar et al. v. Earley
109 S.E. 2d 420, 144 W.Va. 504 (1959)

STATE COURT OF APPEALS

STATE TRIAL COURTS
Unreported

LOCAL COURTS
Unreported

STATEMENT OF
MRS. PETERSON'S PROBLEM

Mrs. Peterson has been receiving AFDC payments of $190 per month. She has just received a notice indicating that her payments will be terminated because her only child is 18 years old and no longer is considered a dependent child under the Regulations of the State of Independence Department of Welfare. Mrs. Peterson's daughter is attending a local college half-time (9 semester hours) and is employed part-time.

You are asked to research the law for Mrs. Peterson.

§420.103 In addition to being deprived of parental support or care, a dependent child, in order to be eligible must be:

.1 Unmarried

.2 Under 21 years of age

.21 Aid may be granted in behalf of a child if he is between his 18th and 21st birthdays and he is *regularly attending* school, a training program or institution of higher education.

.211 Definition of Regular School Attendance

Enrollment in and physical attendance on a full-time basis in a supervised education or vocational training program in a public or private school or college.

.212 Full-time is defined as physical attendance no less than 25 clock hours per week in secondary educational programs, no less than 30 clock hours per week in a trade, technical school or certified training program and no less than 12 semester or quarter hours in a college or university, unless verified physical incapacity or handicap precludes such full-time physical attendance.

United States Code	Code of Federal Regulations
42 U. S. C. 299d	42 CFR Part 54
299e	42 CFR Part 54
299f	42 CFR Part 54
299i	42 CFR Part 54
300	42 CFR Part 59
300a–4	42 CFR Part 59
301nt	20 CFR Part 404
302 through 303	45 CFR Part 222
302	45 CFR Part 70
	Part 233
	Part 248
402	20 CFR Part 404
404	20 CFR Part 404
405	20 CFR Parts 401–404
	Part 422
	31 CFR Part 360
	45 CFR Part 401
406	20 CFR Part 404
409	20 CFR Part 404
410	20 CFR Part 404
411	20 CFR Part 404
412	20 CFR Part 404
413	20 CFR Part 404
414	20 CFR Part 404
415	20 CFR Part 404
416	20 CFR Part 404
417	20 CFR Part 404
418	20 CFR Part 404
	Part 422
421	20 CFR Part 404
	Part 422
422	20 CFR Part 404
	45 CFR Part 401
423	20 CFR Part 404
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425	20 CFR Part 404
426	20 CFR Part 404
426a	20 CFR Part 404
427	20 CFR Part 404
428	20 CFR Part 404
501 through 503	20 CFR Part 601
501	29 CFR Part 31
503	45 CFR Part 70
601 through 606	42 CFR Part 200
602	45 CFR Part 70
	Part 233
	Part 248
607	45 CFR Part 233
626	42 CFR Part 205
639	45 CFR Part 70
641	29 CFR Part 71
701 through 707	42 CFR Part 200
701 through 705	42 CFR Part 206
705	45 CFR Part 70
706	42 CFR Part 205
708	42 CFR Part 51a
	Part 208
711 through 715	42 CFR Part 206
712	42 CFR Part 205
713	42 CFR Part 200
714	42 CFR Part 200

List of CFR Sections Affected

Annual 1973

Volume 38

Numbers 1-248

Includes U.S.C.–C.F.R.
Table of Authorities

Announcing—
Format and Coverage Changes

Changes in coverage of this List will start in January 1974. These changes will coordinate the List with the revision date of the Code books so that users will be able to determine quickly and easily the changes that have occurred since the revision date of the Code books they are using. Starting in January, coverage will be as follows:

January 1974:

- Titles 1–16: Changes published January 1974.
- Titles 17–27: Changes published April 1973 through January 1974.
- Titles 28–41: Changes published July 1973 through January 1974.
- Titles 42–50: Changes published October 1973 through January 1974.

February 1974:

- Titles 1–16: Changes published January and February 1974.
- Titles 17–27: Changes published April 1973 through February 1974.
- Titles 28–41: Changes published July 1973 through February 1974.
- Titles 42–50: Changes published October 1973 through February 1974.

This pattern will continue throughout the year.

Comments and suggestions are invited. Write to the Director of the Federal Register, National Archives and Records Service, Washington, D.C. 20408.

LIST OF SECTIONS AFFECTED

WHAT IT IS

The List of Sections Affected is designed to lead users of the Code of Federal Regulations to amendatory actions published in the Federal Register. Entries indicate the nature of the changes. Certain terms used are defined in the glossary below. Proposed rules are listed at the end of appropriate titles.

CHANGE IN SIZE

The List of Sections Affected has been changed to the same size as the Code of Federal Regulations to improve the usefulness of this finding aid. It should be shelved with current Code volumes.

HOW TO USE THIS FINDING AID

The Code of Federal Regulations may be brought up to immediate date by the following steps:

1. Consult this List of Sections Affected for any changes, deletions, or additions published after the revision date of the volume you are using.
2. Check the "Cumulative List of Parts Affected" appearing at the end of the latest issue of the Federal Register for changes published after the last date covered by this issue of the List of Sections Affected.
3. If the latest edition of the Code of Federal Regulations is not yet available, use the previous year's edition and consult the 1972 Annual List of Sections Affected before beginning with step 1 above.

GLOSSARY

Amended—A typographical unit of the CFR was partially set forth.
Recodified—Major portions of CFR were restructured or rearranged, or both.
Redesignated—A typographical unit or larger was renumbered and transferred from one place to another place in the CFR with no change in text.
Removed—A typographical unit was removed from the CFR.
Revised—A typographical unit of the CFR was set forth in full.
Superseded—An existing CFR unit was replaced by regulations appearing under another CFR unit.
Suspension—The entire CFR unit was not in effect for the period of time indicated.
Suspension in part—A portion of the CFR unit was not in effect for the period of time indicated.
Technical amendment—General amendment that may have no substantive effect on regulations.
Typographical unit—A numbered, lettered or undesignated entity appearing in the CFR.

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A finding aid has been included at the end of this issue which lists the page numbers with the date of publication in the Federal Register.

INQUIRIES AND SUGGESTIONS

Future monthly issues of the List of Sections Affected also will appear in this format. The Office of the Federal Register hopes to bring about other changes which will improve the usefulness of the Federal Register and the Code of Federal Regulations. Inquiries concerning this and other publications of this office and suggestions for improvements will be welcomed by the Director, Office of the Federal Register, National Archives and Records Service, Washington, D.C. 20408.

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Title 45—Public Welfare

CHAPTER II—SOCIAL AND REHABILITATION SERVICE (ASSISTANCE PROGRAMS), DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

PART 233—COVERAGE AND CONDITIONS OF ELIGIBILITY IN FINANCIAL ASSISTANCE PROGRAMS

Age and School Attendance in AFDC

Notice of proposed rulemaking for the program of Aid to Families with Dependent Children (AFDC) was published in the FEDERAL REGISTER on December 19, 1972 (37 FR 27637). The Notice included proposed regulations related to age and school attendance, in response to the Supreme Court decision in Townsend v. Swank.

There were no objections to the age and school attendance requirements, but one State asked for an additional requirement that children age 18 or over who are in school or training must be achieving passing grades or making satisfactory progress.

After consideration of the comments, the provisions regarding age and school attendance are adopted with clarifying changes in the provisions regarding Federal financial participation (§ 233.90 (c)(1)(vi)).

Section 233.90, Part 233, Chapter II, Title 45 of the Code of Federal Regulations is amended by adding subparagraphs (2) and (3) to paragraph (b) and by revising paragraph (c)(1)(vi) as set forth below:

§ 233.90 Factors specific to AFDC.

* * * * * * *

(b) *Condition for plan approval.* (1) A child may not be denied AFDC either initially or subsequently "because of the conditions of the home in which the child resides", or because the home is considered "unsuitable", unless "provision is otherwise made pursuant to a State statute for adequate care and assistance with respect to such child". (Section 404(b) of the Social Security Act.)

(2) An otherwise eligible child who is under the age of 18 years may not be denied AFDC, regardless of whether he attends school or makes satisfactory grades.

(3) If a State elects to include in its AFDC program children 18 and over, it must include all children 18 years of age and under 21 who are students regularly attending a school, college, or university, or a course of vocational or technical training designed to fit them for gainful employment.

(c) *Federal financial participation.* (1) * * *

(vi) *"Student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment."* A child may be considered a student regularly attending a school or a training course:

(A) If he is enrolled in and physically attending a full-time (as certified by the school or institute attended) program of study or training leading to a certificate, diploma or degree; or

(B) If he is enrolled in and physically attending at least half-time (as certified by the school or institute attended) a program of study or training leading to a certificate, diploma or degree and is regularly employed in or available for and actively seeking part-time employment; or

(C) If he is enrolled in and physically attending at least half-time (as certified by the school or institute attended) a program of study or training leading to a certificate, diploma or degree and is precluded from full-time attendance or part-time employment because of a verified physical handicap.

Under this interpretation:

(D) Full-time and half-time attendance are defined, as set forth in Veterans Administration requirements:

(*1*) In a trade or technical school, in a program involving shop practice, full-time is 30 clock hours per week and half-time is 15 clock hours; in a program without shop practice, full-time is 25 clock hours and half-time is 12 clock hours;

(*2*) In a college or university, full-time is 12 semester or quarter hours and half-time is 8 semester or quarter hours;

(*3*) In a secondary school, full-time is 25 clock hours per week or 4 Carnegie units per year and half-time is 12 clock hours or 2 Carnegie units;

(*4*) In a secondary education program of cooperative training or in apprenticeship training, full-time attendance is as defined by State regulation or policy; and

(E) A child shall be considered in regular attendance in months in which he is not attending because of official school or training program vacation, illness, convalescence, or family emergency, and for the month in which he completes or discontinues his school or training program.

(Sec. 1102, Stat. 647 (U.S.C. 1302)).

Effective date.—These regulations in this section shall become effective on November 26, 1973.

Dated August 20, 1973.

JAMES S. DWIGHT, Jr.,
Administrator, Social and Rehabilitation Service.

Approved September 21, 1973.

CASPAR W. WEINBERGER,
Secretary.

[FR Doc.73-20603 Filed 9-26-73;8:45 am]

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ONE WAY TO APPROACH MRS. PETERSON'S PROBLEM

1) Check the local welfare regulations.

2) Go to Index of U.S.C.A., look under:

Social Security
Age
Dependent Child

This refers you to 42 U.S.C.A. §606.

3) Read over §606. You find that §606-a-2-B states:

"...(a) The term 'dependent child' means a needy child ...(2) who is ... (b) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university..."

4) Check Notes of Decisions following §606 to see if any cases are mentioned on this issue.

5) Check §606 in the pocket part to be sure that there have not been any changes.

6)

6) Check Notes of Decisions in the pocket part to see if any new cases have been decided on this issue. This will refer you to Townsend v. Swank 404 U.S. 282, 92 S.Ct. 502, 30 L.Ed. 2d. 448.

7) Read Townsend v. Swank.

8) Shepardize Townsend v. Swank to be sure that it hasn't been reversed.

9) Go to Title 2 of C.F.R. Check under 42 U.S.C.A. §§601-607 to see if any regulations have been issued under these sections. This refers you to 45 C.F.R. Part 233.

10) Read Part 233.90 on "Regularly attending a school, college, or university...". This doesn't add anything to what you learned from the statute.

11) Check List of C.F.R. Sections Affected for 1973 to see if 45 C.F.R. Part 233.90 has been changed. This refers you to Page 26916 of Volume 38 of the Federal Register.

12) Check Federal Register for September 27, 1973, Page 26916. This adds some additional requirements on school attendance.

This problem assumes that you are doing the research in January, 1974.

LEGAL RESOURCES

1) UNITED STATES CODE ANNOTATED (U.S.C.A.)

Contains federal laws passed by the United States Congress, notes on the history of the laws, and notes on cases decided under each law.

2) CODE OF FEDERAL REGULATIONS (C.F.R.)

Contains regulations made by federal administrative agencies such as HEW governing the operation of the agency and the implementation of laws passed by Congress.

3) FEDERAL REGISTER (F.R.)

Published daily, it contains new federal regulations which go into effect on that day. Proposed regulations are also published in the Federal Register.

4) CASE LAW

Decisions of federal and state courts about how laws should be applied in specific fact situations. Opinions are reported in various volumes. (See handout on federal and state courts).

5) SHEPARD'S CITATIONS

Shows the effect of later decisions on a given case, e.g., whether it has been overruled, reversed, or modified in any way by later cases.

6) POVERTY LAW REPORTER

A looseleaf service up-dated regularly, it contains reports of developments in legislation and court decisions in areas of particular concern to legal services offices.

7) CLEARINGHOUSE REVIEW

Published monthly by the National Clearinghouse for Legal Services, it contains case developments and articles on legal services issues.

8) UNITED STATES LAW WEEK (U.S.L.W. or L.W.)

Published weekly, it contains full texts of U.S. Supreme Court decisions immediately after the cases are decided and selected decisions of other federal and state courts.

ADVOCACY AND PROFESSIONAL RESPONSIBILITY

A. Purpose of the Session

The central purpose of this session is to inspire thought and discussion by the trainees on some of the central ethical problems inherent in their roles as Legal Services paralegal advocates. In particular, they should be briefly acquainted with ABA restrictions on advertising, solicitation and confidentiality, and more thoroughly involved in discussion about the resolution of conflicts between the advocate's duty to fully and vigorously represent the client's viewpoint on the one hand and the advocate's own principles and other responsibilities on the other.

B. Components of the Session

The session is composed of five parts:

1. An introduction to the session, explaining its purpose and relationship to the rest of the program; (5 minutes)

2. A brief discussion of selected portions of the ABA Code of Professional Responsibility and ABA Formal Ethics Opinion 334 (on advertising and solicitation) as they apply to Legal Services paralegals; (15 minutes)

3. Brief definitions; (5 minutes)

4. Group discussion centered around realistic examples/ hypotheticals with references to the nine Canons; (at least 90 minutes)

5. A conclusion including a summation of the ethical principles discussed. (5 minutes)

C. Materials for Distribution

1. A list of the nine Canons from the ABA Code of Professional Responsibility to be used during the discussion.

2. An 11-page set of excerpts from the ABA Code of Professional Responsibility and ABA Formal Ethics Opinion 334 to be distributed to the trainees at the end of the session. This is primarily a "take-home" piece.

D. Suggestions for Content of the Components

1. Introduction

a. Purpose of the session, as described above.

b. Components of the session parts 2, 3 and 4, as described above.

c. Relation of this session to the rest of the program. It should be explained to the trainees that no specific portion of the remainder of the program will involve ethical principles, but that attitudes toward advocacy will pervade their conduct during the entire training as well as their future advocacy back home.

2. Definitions

Where possible the trainees should be asked to develop the definitions with the trainer summarizing; however, this section should be very short so you may want to simply give brief "textbook" definitions and ask if everyone understands.

Advocacy: The process in which you, the advocate, try to affect or influence someone elses' behavior according to a predetermined goal. This process occurs in everyday life as well as in legal settings.

Professional ethics: standards of behavior within a certain field.

Legal ethics: that standard of behavior expected within the legal setting.

Adversary system: essentially an impartial arbiter (judge) with two opposing parties (advocate and client vs. advocate and client). Emphasize that the advocate is not there to judge the client.

Professional ethics and advocacy are closely related. They both essentially mean representation of your client to the best of your ability.

3. ABA Code of Professional Responsibility and ABA Formal Ethics Opinion 334

This component should be based on the excerpts from the ABA Code of Professional Responsibility and Formal Ethics Opinion 334 which will be handed out at the end of the session as a "take-home" piece.

The important points to make regarding the Code are:

a. That the Code has four components:

(1) Canons: very general statements of principle
(2) Ethical Considerations: guidance for specific situations
(3) Disciplinary Rules: the mandatory, minimum level below which a lawyer is subject to discipline.
(4) ABA and State Bar ethics opinions: interpretations of the above based on specific fact situations that have arisen.

b. That the Code is "applicable" to paralegals in the sense that they work with and under the supervision of lawyers who are responsible for the conduct of their non-attorney associates and that paralegals should have

ethical and professional responsibilities as well. Also, the Preamble to the Code says that while the Code does not specifically apply to non-lawyers, it does define the conduct that the public has a right to expect from all those who work with lawyers.

c. That the prohibitions against advertising and solicitation in Canon 2 are intended primarily to prevent economic competition among lawyers for paying clients, and ABA "opinions" have given legal services offices a somewhat wider latitude. An effective technique in this section is to ask the paralegals what methods their offices use to inform people of the availability of legal services. The prohibitions and exceptions should be discussed after their examples.

During this section, the list of the nine Canons should be distributed to the trainees and briefly discussed.

4. Discussion of Hypotheticals

This component should begin with a listing (on a black-board) of the levels on which a conflict between a particular client and that client's wishes and an advocate's values can take place. These include:

a. Conflicts of the client's goals with the advocate's own socio-political goals.

b. Conflicts between the tactics chosen by the client and those thought appropriate by the advocate.

c. Conflicts between any particular client's inter-

ests and those of other present and future clients.

Another approach is to ask to whom the advocate has obligations and list them. These include:

a. the particular client

b. the client population as a whole that is served by the program and other similar programs

c. your office and colleagues

d. yourself

The second approach is somewhat simpler and more effective in a short session. If the second approach is used, the conflicts in the first approach should simply be brought out in the discussion.

It is probably most useful to try to focus the discussion in this section by presenting hypothetical cases which the trainees might in fact encounter in their work (thus, not criminal) at each of the levels of potential conflicts. In formulating the hypothetical cases, try to keep them realistic but present only one or two levels of conflict at a time.

The examples that follow are devised to bring out in a dramatic way the conflicts between the advocate's various responsibilities. You should allow the paralegals to discover these conflicts and problems on their own after presenting the basic situation by dramatizing it. Each situation is designed to deal with a few basic issues. After these have been brought out, complications or changes can be introduced to illustrate either the same point again or to bring out additional issues. There will be

no "right" answer or solution to many of the situations. The object is to get the paralegals to think about their responsibilities and how they will handle problems as they arise in the course of their work. The list of "obligations" or "conflicts" and the list of Canons should be referred to as appropriate in the discussion.

Some of the points that the situations are trying to bring out and that should be covered by these or other examples are:

--conflict of interest
--disagreement with the client's goals
--agreement with the client's goals but not the means proposed to achieve them (e.g., perjury)
--dislike of the client
--challenges to the advocate's own personal integrity or values
--when the advocate agrees with the client but losing or winning that case may jeopardize future clients or groups of clients
--protection of client confidences and attorney-client privilege

The discussion will show that there are conflicting and competing canons, rules, obligations and interests.

It should be pointed out before the examples, that all the clients portrayed are financially eligible for legal services.

(45 minutes) A. The advocate is in a Fair Hearing representing Mrs. Smith. The issue is deprivation. She has told you that her husband spent Christmas week at her house but otherwise he has not stayed overnight on any occasion in the past nine months. In response to a question from the hearing officer, she states unequivocally that her husband has <u>never</u> stayed overnight in the last nine months.

This situation is best presented in dramatic form. Have one trainer play the role of the hearing officer/

moderator and another the role of Mrs. Smith. A third trainer is the advocate.

The moderator should set the first scene as being the close of the client-advocate conference the evening before the hearing. The conversation is essentially as follows:

ADVOCATE	MS. SMITH
Now that we have discussed your case and the fair hearing procedures, do you understand what is going to happen at the hearing tomorrow?	Yes, I think so!
You realize that the hearing officer may ask you some questions also?	Oh, yes.
We have a good case and the most important thing is for you to tell the truth.	I will, and I'm glad our case looks good.
Now that we've reviewed the questions I'll be asking you in my direct examination, before you go, I'd like to review a few questions that might be asked by the welfare department's representative or the hearing officer.	O.K.
Just pretend that I'm the welfare department--- Now Mrs. Smith, how long has your husband been gone?	A little more than nine months...
How often does he come to your home?	Every once in a while, just to visit the children. I never know when he is going to come.

ADVOCATE	MS. SMITH
Has he stayed overnight at your home since he moved out?	Yes, once, he stayed Christmas week to play Santa Claus.
Do you intend to resume your marriage, that is, do you and your children plan to live with Mr. Smith again?	No, I don't want him back and he ain't doing nothing for the children.
Does your husband make financial contributions to you or your children?	Contributions!!! he only brought some candy and junk. This is his idea of child support.

After the above conversation, the advocate-trainer reiterates the advice on telling the truth, adds another reassurance and arranges to meet the next day.

Next the moderator should set the scene as being at the fair hearing. There is now an exchange between the client-trainer and the hearing officer-trainer essentially as follows:

HEARING OFFICER	MS. SMITH
Now, Mrs. Smith, I'd just like to ask you a few questions to get a few things straight in my mind. First, how long did you say your husband had been gone from your home?	He's been gone a little over nine months.
And how often does he come to visit?	He only comes to visit the kids and I never know when that's going to be--certainly not very often.
And has he stayed overnight at your house in that nine months since he's been gone?	No, he certainly hasn't.
What contributions does he make to the support of you and the children?	Nothing at all--he just brings candy and junk once in a while.

ADVOCATE-TRAINER

Excuse me, Mr. Hearing Officer. May I have a moment to speak with my client.

HEARING OFFICER

Yes, you may.

The advocate-trainer must then decide what to do in the face of the apparent lie. The trainer should ask the trainees to assume the role of the advocate and figure out what they would do.

Should the advocate ask to speak to the client briefly as the advocate-trainer did? Discuss with the trainees the technique used by the advocate-trainer of waiting for another question to be asked and answered before interrupting the questions by the hearing officer. The trainees should spot and point out that technique by themselves.

Should the advocate ask for a recess?? How should the request(s) be made? While talking with the client, how should the advocate explain the problem and the alternative solutions?? Some of the alternatives would be an explanation by the client, an agreement to tell the truth to the hearing officer, or withdrawal of the advocate from the case. In the first two situations, what should the advocate do upon returning to the hearing?? The client-trainer should be absolutely adamant about refusing to tell the truth. What should the advocate do in that situation?? How do you ask to

withdraw from a case without prejudicing the client?? What do you say if the hearing officer wants to know why you want to withdraw?? What do you do if the hearing officer refuses to let you withdraw?? Should you make the record clear as to exactly what is transpiring? How would you do that?

In having the trainees present solutions to all of the above questions, they should be asked to role play with the client-trainer and the hearing officer-trainer. In the role play of initially discussing with the client what happened, the client should react essentially as follows:

MRS. SMITH

Look, I'm sorry. I talked to my friend Sally after I left your office yesterday. And she told me that anyone who tells the welfare department or the hearing people about any man sleeping over gets cut off. So I don't think I ought to tell him about Christmas week.

As the paralegals attempt to convince the client, the client becomes even more adamant.

Look, the welfare department doesn't know he stayed over Christmas. I'm not going to tell them and you're surely aren't going to tell them. Right???

I'm sorry I can't tell him. You know it and I know it but why should I tell him.

If he cuts my check are you going to feed my kids?

Just like you aren't going to feed my kids, I'm not going to tell that man.

Usually the paralegals make a big point of the fact that the husband was just visiting to play Santa Claus for the children. To liven up the session and to raise a few additional questions, the client-trainer can say to the advocates, "You mean you didn't understand what playing Santa Claus means??"

In dealing with this problem, the most effective approach is for the moderator-trainer to list the theories that the trainees come up with and ask them to debate the alternatives. They should realize that there are different ways to approach problems such as this one and they should have the confidence to come to their own decisions. Whatever decision they come to, however, they should be able to defend it and explain why they reached it.

(10-15 minutes) B. Have one of the trainers play a potential client, Mrs. or Mr. Bigot, who tells the following story:

> I really need someone to represent me and I have no money to pay anyone. I have two kids and the welfare agency is trying to take them away from me. Besides, the school is telling me that the kids are suspended for truancy and there is going to be a hearing. Well, my kids aren't in school. I won't let them go - not to that neighborhood school with all the busing in of "those people". (Use whatever group seems appropriate). Their education is suffering at school. The teachers spend all their time with those stupid kids who don't even know how to read. I've read up on the law and I know that I can keep the kids home if there are appropriate alternative arrangements for them. The board has

refused to transfer them to an acceptable school. I'll stay home and tutor them or else they should get the transfer.

Have another trainer play the advocate faced with the question of whether to represent this client. That trainer should pose questions to the trainees asking for assistance in reaching a decision. The basic issues are whether to represent someone where there is a basic conflict of personal ideology and whether representing that person and winning will set a bad precedent for future clients.

(10 minutes) C. Have a trainer play the following client, Dorothy Demand:

> I am a welfare recipient and I demand a fair hearing and I want you to represent me. You know I've demanded 10 fair hearings already this year. I really like to bother that awful department. I've gone in by myself all the other times and I keep losing so this time I want you to represent me. After all I need a new stove. They won't give me one. They told me the regulations only allow them to pay for a new appliance if the old one is destroyed by a natural disaster like a flood or earthquake. I don't care what they say. I should have a hearing and someone to represent me. (She is extremely obnoxious and difficult to deal with --won't let you get a word in edgewise).

Have another trainer pose questions based on the following points:

What if you know you will lose on the law and that this is a frivolous request? What if a pipe has burst and the ensuing "flood" has ruined her old stove; so you could make a reasonable argument that the regulation should apply to her? What if an earthquake caused the pipe to burst?

How do you deal with your fear that handling the case of someone who makes frivolous requests and is really obnoxious will affect your reputation and your ability to deal with the welfare department in the future?

What if the regulation states that stoves should be available to anyone who needs one; but you just can't stand to deal with the woman and feel you can't go all out for her?

(15 minutes) D. A moderator-trainer should ask the trainees how they would handle the following situations. These are presented directly without role playing as questions requiring only brief answers.

You represented Mrs. Jones in a fair hearing a few months ago. (1) a collection agency employee come to ask you how he can reach her -- just wants her phone number -- wants to know about her sources of income -- wants you to have her call him (2) a marriage counselor, who really wants to help your client, wants her address (3) a close relative who can't locate your client wants her address and phone number (4) the Internal Revenue Service wants her address and phone number (5) the local police want her address and phone number as part of a criminal investigation (a) of her (b) of an incident where she was a witness.

What if you are subpoenaed to testify in a welfare fraud prosecution against Thelma Martin, whom you represented at a fair hearing a few months earlier?

Discuss both confidentiality and lawyer-client privilege. Does the privilege extend to paralegals? What if Dick Smith, an attorney in your office, had represented Ms. Martin at the fair hearing and you had helped him with the research and investigation for the case. Is the situation as to testifying any different then??

The distinction between the ethical obligation to keep client communications confidential and the statutory lawyer-client privilege should be covered in lecture form by one of the trainers. The statutory privilege in most states either specifically includes or has been held to include communications with an employee of an attorney. For a communication with the employee to be protected, the communication must be for the purpose of transmitting the information to the attorney.

Basically, the point to make is that for communication between paralegals and clients to be privileged under existing law, the client must have a direct relationship with the supervising attorney. The employee is covered only through the attorney.

The difficult situations, where current law is either not clearly defined or inadequate, are those where the paralegal handles the case on his/her own - for example, administrative representation.

The issue of being subpoenaed to testify should be discussed as an extremely rare problem. It should be pointed out that a person must appear when subpoenaed. If a paralegal is ever subpoenaed (and none have been to our knowledge), an attorney should go with him/her to any hearing. Even though you appear, you need not necessarily answer questions. First, you may not have direct evidence on the questions raised. Second, even if you have information, you might assert the attorney-client privilege.

Canon 4's protection of client confidences are particularly important to be kept in mind by Legal Services advocates given the tendency of interaction with "social work" agencies in the course of representation of clients involved with them. Legal Services advocates are not in the business of "doing good" for clients against the wishes of the client; sharing information which another agency might use to manipulate a client is inconsistent with the role of advocate.

(5 minutes) E. The following are short problems that might be raised if time allows. They should be posed simply as questions requiring one line answers.

What if you are asked to represent a tenant and you rent from the same landlord?

What if your office represents the husband in a divorce case and the wife comes in and asks you to help

her get child support? What if the wife asks you to help her defend against an eviction?

What if a relative or close friend asks you to represent her in a fair hearing? What if you agree and you know that she isn't telling the story the way you know it really to be? Does this present different problems than the first hypothetical? How will you feel about demanding cooperation from a friend or relative?

5. Conclusion

Summarize the discussion to the extent possible in the time remaining. The trainees should be reminded again that there are no absolutely "right" or "wrong" positions in these various conflicts, and that tension will always exist between opposing ideals. The important thing is for them to be aware of ethical considerations in making their decisions.

ABA
CODE OF PROFESSIONAL RESPONSIBILITY

CANON 1

A LAWYER SHOULD ASSIST IN MAINTAINING THE INTEGRITY AND COMPETENCE OF THE LEGAL PROFESSION.

CANON 2

A LAWYER SHOULD ASSIST THE LEGAL PROFESSION IN FULFILLING ITS DUTY TO MAKE LEGAL COUNSEL AVAILABLE.

CANON 3

A LAWYER SHOULD PREVENT THE UNAUTHORIZED PRACTICE OF LAW.

CANON 4

A LAWYER SHOULD PRESERVE THE CONFIDENCES AND SECRETS OF A CLIENT.

CANON 5

A LAWYER SHOULD EXERCISE INDEPENDENT PROFESSIONAL JUDGMENT ON BEHALF OF A CLIENT.

CANON 6

A LAWYER SHOULD REPRESENT A CLIENT COMPETENTLY.

CANON 7

A LAWYER SHOULD REPRESENT A CLIENT ZEALOUSLY WITHIN THE BOUNDS OF THE LAW.

CANON 8

A LAWYER SHOULD ASSIST IN IMPROVING THE LEGAL SYSTEM.

CANON 9

A LAWYER SHOULD AVOID EVEN THE APPEARANCE OF PROFESSIONAL IMPROPRIETY.

EXCERPTS FROM THE AMERICAN BAR ASSOCIATION
CODE OF PROFESSIONAL RESPONSIBILITY
CANONS, ETHICAL CONSIDERATIONS, AND DISCIPLINARY RULES

From The Preliminary Statement

Obviously the Canons, Ethical Considerations, and Disciplinary Rules cannot apply to non-lawyers, however, they do define the type of ethical conduct that the public has a right to expect not only of lawyers but also of their non-professional employees and associates in all matters pertaining to professional employment. A lawyer should ultimately be responsible for the conduct of his employees and asscciates in the course of the professional representation of the client.

The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived.

The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer should rely for guidance in many specific situations.

The Disciplinary Rules. . . are mandatory in character. [They] state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.

Canon 1: A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession.

Canon 2: A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available.

DR 2-101(A): A lawyer shall not prepare, cause to be prepared, or participate in the use of, any form of public communication that contains professionally self-laudatory statements calculated to attract lay clients.

DR 2-103(A): A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer.

DR 2-103(C): A lawyer shall not request a person or organization to recommend employment, as a private practitioner, of himself, his partner, or associate, except that he may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists....

Canon 3: A Lawyer Should Assist in Preventing the Unauthorized Practice of Law

Canon 4: A Lawyer Should Preserve the Confidences and Secrets of a Client

EC 4-1: Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

EC 4-2: ....Unless the client otherwise directs, a lawyer may disclose the affairs of his client to partners or associates of his firm. It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to non-lawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyer to exercise care in selecting and training his employees so that the sanctity of all confidences and secrets of his clients may be preserved.

EC 4-4: The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, he should avoid professional discussions in the presence of persons to whom the privilege does not extend. A lawyer owes an

obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client.

DR 4-101(A): "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

DR 4-101(B): Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.
(2) Use a confidence or secret of his client to the disadvantage of a client.
(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

DR 4-101(C): A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
(3) The intention of his client to commit a crime and the information necessary to prevent the crime.
(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

DR 4-101(D): A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

Canon 5: <u>A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client</u>

EC 5-1: The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interest, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

EC 5-2: A lawyer should not accept proferred employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely

the advice to be given or services to be rendered the prospective client.

EC 5-13: A lawyer should not maintain membership in or be influenced by any organization of employees that undertakes to prescribe, direct, or suggest when or how he should fulfill his professional obligations to a person or organization that employs him as a lawyer. Although it is not necessarily improper for a lawyer employed by a corporation or similar entity to be a member of an organization of employees, he should be vigilant to safeguard his fidelity as a lawyer to his employer, free from outside influences.

EC 5-15: If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation.

EC 5-21: The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment.

EC 5-23: A person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of those lawyers. Some employers may be interested in furthering their own economic, political, or social goals without regard to the professional responsibility of the lawyer to his individual client. Others may be far more concerned with the establishment or extension of legal principles than in the immediate protection of the rights of the lawyer's individual client. On some occasions, decisions on priority of work may be made by the employer rather than the lawyer with the result that prosecution of work already undertaken for clients is postponed to their detriment. Similarly, an employer may seek, consciously or unconsciously, to further its own economic interests through the actions of the lawyers employed by it. Since a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third persons, the lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom.

Canon 6: <u>A Lawyer Should Represent A Client Competently</u>

DR 6-101(A): A lawyer shall not:

(1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.

(2) Handle a legal matter without preparation adequate in the circumstances.
(3) Neglect a legal matter entrusted to him.

Canon 7: A Lawyer Should Represent A Client Zealously Within the Bounds of the Law

EC 7-1: The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations.

EC 7-3: Where the bounds of the law are uncertain, the action of a lawyer may depend on whether he is serving as advocate or adviser. A lawyer may serve simultaneously as both advocate and adviser, but the two roles are essentially different. In asserting a position on behalf of his client, an advocate for the most part deals with past conduct and must take the facts as he finds them. By contrast, a lawyer serving as advisor primarily assists his client in determining the course of future conduct and relationships. While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law. In serving as advisor, a lawyer in appropriate circumstances should give his profesional opinion as to what the ultimate decisions of the courts would likely be as to the applicable law.

EC 7-4: The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail. His conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extention, modification, or reversal of the law. However, a lawyer is not justified in asserting a position in litigation that is frivolous.

EC 7-5: A lawyer as adviser furthers the interest of his client by giving his professional opinion as to what he believes would likely be the ultimate decision of the court on the matter at hand and by informing his client of the practical effect of such decision. He may continue in the representation of his client even though his client has elected to pursue a course of conduct contrary to the advise of the lawyer so long as he does not knowingly assist the client to engage in illegal conduct or to take a frivolous legal position. A lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefore.

EC 7-8: A lawyer should exert his best efforts to ensure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advise of a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally as well as legally permissible. He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. In the final analysis however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client and not for himself. In the event that the client in a non-adjudicatory matter insists upon a course of conduct that is contrary to the judgment and advise of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment.

EC 7-17: The obligation of loyalty to his client applied only to a lawyer in the discharge of his professional duties and implies no obligation to adopt a personal viewpoint favorable to the interests or desires of his client. While a lawyer must act always with circumspection in order that his conduct will not adversely affect the rights of a client in a matter he is then handling, he may take positions on public issues and espouse legal reforms he favors without regard to the individual views of any client.

EC 7-36: Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. Although a lawyer has a duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of proceedings.

DR 7-102(A): In his representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, delay a trial or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

(3) Conceal or knowingly fail to disclose that which he is required by law to reveal.
(4) Knowingly use perjured testimony or false evidence.
(5) Knowingly make a false statement of law or fact.
(6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.
(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.
(8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

DR 7-110(B): In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:

(1) In the course of official proceedings in the cause.
(2) In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.
(3) Orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.
(4) As otherwise authorized by law.

Canon 8: A Lawyer Should Assist In Improving the Legal System

Canon 9: A Lawyer Should Avoid Even the Appearance of Professional Impropriety

ETHICAL OUTLOOK

by
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Assistant Director,
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Reprinted in full below is Formal Opinion 334 of the American Bar Association Committee on Ethic and Professional Responsibility, adopted August 10, 1974. The opinion was originally published at 60 A.B.A.J. 1273 (Oct. 1974). Issuance of the opinion was preceded by the Committee's public hearings on "Ethical Aspects of Restrictions on (Non-Profit) Legal Assistance Offices" held at NLADA's 51st Conference, 31 NLADA Briefcase 481 (1973), and comments it received on *proposed* Formal Opinion 334, published at 60 A.B.A.J. 329 (March, 1974) and 32 NLADA Briefcase 8 (1974).

Formal Opinion 334 is of vital importance to practice in a Legal Services Organization.

The opinion will receive widespread attention at NLADA's 52nd Annual Conference, resulting in a comprehensive analysis to appear in the next issue of the *Briefcase*. Persons interested about the effects of the opinion on legal services practice should be prepared to discuss their concerns at the conference. If you will not be able to attend the conference please submit your comments to Donald Gartman at NLADA's Washington office.

Formal Opinion 334
(August 10, 1974)

Legal Services Offices: Publicity; restrictions on lawyers' activities as they affect independence of professional judgment; client confidences and secrets.

CANONS, DISCIPLINARY RULES, AND ETHICAL CONSIDERATIONS CITED. Canon 2; Canon 4; Canon 5; D.R. 2-101(A) and (B)(6); D.R. 2-103(D)(1); D.R. 7-107(G); D.R. 5-107(B); D.R. 7-101; D.R. 2-102; D.R. 2-104; D.R. 4-101 (B)(1); E.C. 2-25; E.C. 23; E.C. 5-1; E.C. 2-27; E.C. 2-28; E.C. 5-24; E.C. 5-23; E.C. 5-21; E.C. 4-2; and E.C. 4-3.

Publicizing the services provided by a legal services office is proper within limits herein prescribed. The activities on behalf of clients by the staff of lawyers of a legal services office may be limited or restricted only to the extent necessary to allocate fairly and reasonably the resources of the office and to establish proper priorities in the interest of making maximum legal services available to the indigent and then only to an extent and in a manner consistent with the requirements of the Code of Professional Responsibility. Board supervision of the activities of a legal services office may not interfere with the lawyers' preservation of client confidence and secrets.[1]

THE Standing Committee on Ethics and Professional Responsibility is limited in its opinions to interpretations of the Code of Professional Responsibility. It is not the committee's function to determine the most effective means of achieving the goal of making adequate legal services available to the indigent. Nonetheless, this committee wishes to re-emphasize, at the outset of this opinion, the importance of all lawyers striving to make legal services available within the bounds of professional responsibility.

"Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed, by the profession. Every lawyer should support all proper efforts to meet this need for legal services." E.C. 2-25.

Most recently, the Legal Services Corporation Act of 1974 has provided funding to legal services offices through a public legal services corporation.

The general subject to which this opinion is addressed falls into three categories, each of which will be dealt with separately. They are publicity, independence of professional judgment, and preservation of confidences and secrets. The opinion does not involve ethical aspects of programs other than those of legal services offices; for example, it does not include prepaid legal service programs, which are concerned with making legal services available to all income groups rather than to the indigent.

1. Publicity.

Canon 2 requires a lawyer to assist the legal profession in fulfilling its duty to make legal counsel available. To what extent may a legal services office publicize its activities or suggest to individuals that its services be utilized without involving the lawyers acting on its behalf in a violation of the restrictions on publicity[2] or on the seeking of legal business?[3]

Previous opinions have allowed legal services offices to make known their availability to potential clients.[4] Informal Opinion 1227 states:

"Our view is in keeping with history. In Formal Opinion 148, this Committee sanctioned the publicizing of the availability of legal services

1. The committee has heretofore issued a number of informal opinions upon various aspects of the above subject (Nos. 992, 1081, 1172, 1208, 1227, 1230, 1232, 1234, 1252 and 1287) and one formal opinion upon the subject generally (No. 324), some of which have been misunderstood in some quarters, and one of which (Informal Opinion 1232) declined a request to reconsider (Informal Opinion 1262). In view of the importance of the subject, the committee held a public hearing on October 25, 1973, in San Diego, California, on advance notice published in 59 A.B.A.J. 976 (1973). It was held during the annual meeting of the National Legal Aid and Defender Association. A large number of interested persons testified at the hearing. The committee published a proposed opinion in 60 A.B.A.J. 329 (1974). Numerous comments were received and considered by the committee. From all of this it is manifest to the committee that there is widespread interest in the subject which justifies the issuance of another formal opinion elaborating and clarifying Formal Opinion 324, issued more than three years ago, and relating the various informal opinions cited to it.

2. D.R. 2-101 and D.R. 2-102.

3. D.R. 2-103 and D.R. 2-104.

4. As early as Formal Opinion 148 (1935) the committee held that the broadcast of an offer to represent indigent persons in asserting their constitutional rights was not improper. This opinion was cited with approval in Informal Opinion 786 almost thirty years later, the committee saying "the problem of defending constitutional rights today is no less important than it was in 1935." Again three years later in Informal Opinion 992 the committee reiterated the principles embodied in Formal Opinion 148. In Informal Opinion 1227 the committee approved Informal Opinion 992, which in turn embodied Formal Opinion 148, indicating that under the Code of Professional Responsibility the same result would be reached as in these two opinions.

without charge by lawyer with somewhat different social philosophies from those associated with [name omitted]. Consistency compels that we not waver from the sound principle there set forth to the effect that the various former canons cited by objectors were 'never aimed at a situation such as this, in which a group of lawyers announce that they are willing to devote some of their time and energy to the interests of indigent citizens whose constitutional rights are believed to be infringed. The adoption of the [Code of Professional Responsibility] only strengthens this observation, observing as it does in the first provision of E.C.-1:

" 'A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence.' "

D.R. 2-101(B), as amended by the House of Delegates of the American Bar Association in February, 1974, provides:

"A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in city or telephone directories, or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf, except that a lawyer recommended by, paid by, or whose legal services are furnished by, any of the offices or organizations enumerated in D.R. 2-103(D)(1) through (5) may authorize or permit or assist such organization to use such means of commercial publicity, which does not identify any lawyer by name, to describe services or legal service benefits. . . ."[5]

There are, however, limitations upon the publicity which may be given the activities of a legal services office:

A. General Availability. Publicity reasonably calculated to educate persons as to their legal rights and responsibilities, to spread knowledge of the availability of legal services generally or with respect to representation on specific problems, or to inform others of the activities of a legal service program is ethical if carried on by a legal services office in compliance with D.R. 2-101(A) and (B), as amended February, 1974. Informal Opinion 1172 construed D.R. 2-101(A) as prohibiting any publicity which contains an "element or extolling any individual lawyer for his role in the case." The publicity of a legal services office should be designed to acquaint its public with the availability of the office's services, not those of individual attorneys it employs. Individual lawyers may be identified in private responses to inquiries to the extent permitted by D.R. 2-101(B)(6).

B. Particular Causes. A staff lawyer in a legal services office may advise a client of the client's right to initiate litigation. There is nothing to prevent a lawyer from serving a legal services office which makes known through any method of publicity not proscribed by a disciplinary rule that services are available to indigents with claims to assert such claims on their behalf. E.C. 2-3 is helpful as a guideline for staff lawyers, where it states in part:

". . . The giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist laymen in recognizing legal problems. The advice is proper only if motivated by a desire to protect one who does not recognize that he may have legal problems or who is ignorant of his legal rights or obligations. Hence, the advice is improper if motivated by a desire to obtain personal benefit, secure personal publicity, or cause litigation to be brought merely to harass or injure another. . . ."

C. Filing of Actions. The publicizing by a legal aid society of the filing of suits by lawyers employed by it was approved by a majority of the committee over a vigorous dissent in Informal Opinion 1172. The majority opinion recognized that there should be "no element of extolling any individual lawyer for his role in the case," as this would "introduce a wholly different consideration." Informal Opinion 1230 qualified that holding to the extent that, while there is nothing improper in furnishing to public media copies of pleadings which are matters of public record, information should be furnished only upon request because "the voluntary furnishing by counsel to the public media of pleadings prepared by him constitutes an invitation to those media to publish and comment upon the contents of these pleadings and is itself an extra judicial statement in contravention of D.R. 7-107(G)." The practices suggested in the opinion were intended "to put a brake on any tendency to rush into print or to draft complaints with an eye to biased publicity which might affect the impartiality of the tribunal."

Within these limitations, we hold that the publicizing of the activities of a legal services office is within the scope of the Code of Professional Responsibility, and there is there is nothing improper in a lawyer acting on behalf of an office which engages in such publicity.

2. Independence of Judgment.

Canon 5 requires a lawyer to exercise independent professional judgment on behalf of a client. To what extent may a governing board prescribe organizational rules and regulations or operational methods of a legal services office to limit or restrict the activities of lawyers acting on behalf of clients of the office without placing those lawyers in violation of the duty to exercise their independent judgment in legal matters? D.R. 5-107(B).

We hold that the activities on behalf of clients of the staff of lawyers of a legal services office may be limited or restricted only to the extent necessary to allocate fairly and reasonably the resources of the office and establish proper priorities in the interest of making maximum legal services available to the indigent, and then only to an extent and in a manner consistent with the requirements of the Code of Professional Responsibility.

A. Broad Policy Matters. The committee previously attempted answers to the problems presented in this area in Formal Opinion 324 and Informal Opinions 1232 and 1252.[6] Formal Opinion 324 states that: ". . . the governing board of a legal aid society has a moral and ethical obligation to the community to determine such broad policy matters as the financial and similar criteria of persons eligible to participate in the legal aid program, selection of the various services which the society will make available to such persons, setting priorities in the allocation of available resources and manpower and determining the types or kinds of cases staff attorneys may undertake to handle and the type of clients they may represent."

B. Case-by-case Supervision. The committee further held in Formal Opinion 324 that there should be no interference with the lawyer-client relationship by the directors of a legal aid society after a case has been assigned to a staff lawyer and that the board should set broad guidelines respecting the categories or kinds of cases that may be undertaken rather than act on a case-by-case, client-by-client basis.

The above holdings still appear to the committee to be sound and fully supported by the sections of the Code of Professional Responsibility.

Although no one has really taken issue with the principles embodied in Formal Opinion 324, questions have

5. Legal services offices are treated in D.R. 2-103(D)(1).

6. These holdings were based primarily upon D.R. 2-103 (D)(1) and 5-107(B), along with E.C. 5-24, but the committee also cited E.C. 2-25, 2-27, 2-28, 5-1, 5-21, and 5-23.

arisen in connection with the committee's application of those principles to specific cases, particularly in Informal Opinions 1232 and 1252 cited above.

Informal Opinion 1232 involved class actions, and we turn first to problems concerning them as illustrative.

C. Class Actions. If a staff attorney has undertaken to represent a particular matter and the full representation of that client (aside from any collateral objective such as law reform) requires the filing of a class action in order to assert his rights effectively, then any limitation upon the right to do so would be unethical. Of course, in the case of any proposed class action it is the individual client who must make the decision to expand the suit into a class action after a full explanation of all of the foreseeable consequences. However, if the purpose of expanding the suit to a class action is not solely to protect the rights of the individual client, or a group of similarly situated clients, but primarily to obtain law reform, and law reform, as such, is not one of the authorized purposes of the legal services office, the case cannot be expanded to a class action unless the authorized purposes are changed to include law reform. This follows from our determination that it is a permissible function of the board in allocating resources to determine "the various services which the society will make available."

A governing board may legitimately exercise control by establishing priorities as to the categories or kinds of cases which the office will undertake. It is possible that, in order to achieve the goal of maximizing legal services, services to individuals may be limited in order to use the program's resources to accomplish law reform in connection with particular legal subject matter. The subject matter priorities must be based on a consideration of the needs of the client community and the resources available to the program. They may not be based on considerations such as the identity of the prospective adverse parties or the nature of the remedy ("class action") sought to be employed. E.C.-1.

D. Advisory Committees to Governing Boards. In Informal Opinion 1232, Inquiry No. 3 was: "Does the requirement in Condition No. 8 of prior consultation with an attorney advisory committee of the board of directors prior to filing a class action violate the code?"

This committee's answer was:

"In our view this requirement does not violate the code, as it is entirely proper to require a staff attorney or the executive director to consult with an attorney advisory committee prior to bringing suit. This prior consultation does not mean that a class action cannot be brought without the approval of the attorney advisory committee, but simply that there must be some discussion of the subject prior to the bringing of the class action. It may well be desirable to have a full discussion to avoid possible errors of judgment due to hasty action or action taken based on a distorted view of the facts, or the exercise of poor judgment."

We wish to add to that opinion. It is difficult to see how the preservation of confidences and secrets of a client can be held inviolate prior to filing an action when the proposed action is described to those outside of the legal services office. It could be pointed out that the legal services office lawyers and the advisory committee may have equal access to "possible errors of judgment" or "exercise of poor judgment." However, if an advisory committee consisted entirely of lawyers, if it had no power to veto the bringing of a suit but was advisory only, and if the requirement of prior consultation did not in practice result in interference with the staff's ability to use its own independent professional judgment as to whether an action should be filed, there would appear to be no harm in requiring such consultation. But if such a requirement did in fact result in interference with the exercise of the staff's independent judgment, it would be improper.

The members of the advisory committee should not be given confidences or secrets of the client, for there is no lawyer-client relationship between the client and the advisory committee or any member of it. The requirement of prior consultation should recognize that the obligation of the staff lawyers to preserve the confidences and secrets of clients applies to statements to and information conveyed to the advisory committee or for that matter a state bar committee or any other person or body not privy to the lawyer-client relationship.

E. Supervision by Senior Staff Lawyer. This committee's response to Inquiry No. 2 in Informal Opinion 1232 reiterated that it is improper to require prior approval on a case-by-case basis before a class action is filed, citing Informal Opinion 324. To the extent that this response indicated that the prior approval of a senior lawyer in a legal services office could not be required, it is hereby expressly overruled. It must be recognized that an indigent person who seeks assistance from a legal services office has a lawyer-client relationship with its staff of lawyers which is the same as any other client who retains a law firm to represent him. It is the firm, not the individual lawyer, who is retained. In fact, several different lawyers may work upon different aspects of one case, and certainly it is to be expected that the lawyers will consult with each other upon various questions where they may seek or be able to give assistance. Staff lawyers of a legal services office are subject to the direction of and control of senior lawyers, the chief lawyer, or the executive director (if a lawyer), as the case may be, just as associates of a law firm are subject to the direction and control of their seniors. Such internal communication and control is not only permissible but salutary. It is only control of the staff lawyer's judgment by an external source that is improper.

F. State Bar Committee. The final two inquiries in Informal Opinion 1232 raised a different question. The first of these (Inquiry 4) and the committee's response to it are illustrative:

"Is it proper under any circumstances to permit, in accordance with Condition No. 12, a committee of the state bar to co-exist with the board of directors of a legal service program, regardless of the function of such committee?"

"There is nothing improper in permitting a committee of the state bar to confer with the board of directors of a legal services program in the absence of the exercise of any control by the state bar committee which would violate the guidelines set forth in Formal Opinion 324 or Informal Opinion 1208."

The correctness of the above conclusion seems inescapable but, in view of the question, rather meaningless.

The final inquiry (Inquiry 5) questioned the ethical propriety of assigning such a committee of the state bar the function of advising the Office of Economic Opportunity on a continuing basis whether the program of the legal services office was operated in a manner consistent with the applicable canons, guidelines, and legislation and within the terms of its grant. This the committee likewise held to be proper.

It is true that the inquiry dealt with the so-called "watchdog" function of the state bar committee, but that function was exercised over the operation of the legal services office itself and not over the staff lawyers. The same would be true of state advisory councils, such as those to be established pursuant to Section 1004(f) of the Legal Services Corporation Act of 1974. It therefore involved no question of legal ethics.

As the committee held: "We do not think that the existence of this committee to perform the functions outlined in the correspondence which you have sent us violates the Code of Professional Responsibility. It does not in any way control the actions of the staff attorneys who are responsible for carrying out the functions of the legal aid society."

There is no ethical reason why a lawyer could not serve upon such a watchdog committee or council so long as the provisions of the Code of Professional Responsibility were respected, but to the extent that such special scrutiny was motivated by hostility to legal services offices, or the effect of the state bar committee's activities was to impair the rendition fo proper legal representation to the indigent, service upon such a committee by a lawyer would be contrary to the ethical considerations of Canon 2.

G. Legislative Activity. Informal Opinion 1252 said:

"In our view this proviso [former D.R. 2-103(D)(1)] does not bar the governing body of a legal aid society from broadly limiting the categories of legal services that its attorneys may undertake for a client—in this instance excluding political activity and lobbying in support of a bill, rule, regulation or ordinance drafted for a client. The proviso is directed against interference with the exercise of the attorney's independent professional judgment in those matters which they do undertake on behalf of a client."

The opinion certainly does not hold that a lawyer employed by a legal services office may not engage in law reform or seek to secure the passage of legislation. In fact, it says specifically that "any lawyer, whether he drafted legislation for a client or not, may of course as a citizen, gratuitously engage in activities of a political nature in support of it."[7]

What the opinion does hold is that the governing body of a legal aid society may broadly limit the categories of legal services its lawyers may undertake for a client, and that in doing so it may, but need not, exclude such categories as political activity and lobbying. There are three important qualifications inherent in this statement. First, in the absence of such affirmative action by the board, no such limitation exists. Second, the action of the board must be a broad limitation upon the scope of services established prior to the acceptance by the staff lawyer of representation of any particular client, and preferably made known to its public and staff in advance like any other limitation on the scope of legal services offered. Once representation has been accepted, under D.R. 5-107(B) and D.R. 7-101 nothing can be permitted to interfere with that representation to the full extent permitted by law and the disciplinary rules, including, of course, legislative activity.

The phrase "independent professional judgment" is not specifically defined in the Code of Professional Responsibility and is not susceptible to easy interpretation, but a reading of E.C. 5-1 through 5-24 will establish the spirit with which the lawyer's duty should be carried out. Subordination of the lawyer's own interests is implicit, as is the correlative promotion of the client's legitimate objectives.

It has been suggested that even the limitations upon the activities of a legal services office permitted by Formal Opinion 324 are improper because, while a private law office may limit its activities in any way it pleases, as the services which it does not furnish will be available elsewhere, the indigents have nowhere else to turn and therefore any limitation upon the services available at a legal services office amounts to a deprivation of those services. The Code of Professional Responsibility does not ban such limitations. As a practical matter, the resources of a legal services office are always limited, and some allocation of them upon a basis of priorities must be made if they are to be effectively utilized. As long as this is done fairly and reasonably with the objective of making maximum legal services available, within the limits of available resources, it is not improper.

It has been urged that there are certain rights of indigent clients which can only be asserted through legislative means. There can be no limitation on the availability of the staff lawyer to give advice in connection with such legislative means. D.R. 5-107(B).

Finally, limitations upon the activities of a legal services office which stem from motives inconsistent with the basic tenet set out in E.C. 5-1 are always improper. As a general proposition it may be stated that the obligation of the bar to make legal services available to the indigent requires that no such limitations should be imposed upon a legal services office and no staff lawyer should subject himself to such limitations. Whether or not such reprehensible motives are present must necessarily be determined upon the facts of each individual case.

3. Preservation of Confidence and Secrets

Canon 4 requires a lawyer to preserve the confidences and secrets of a client. To what extent may a legal services office allow its activities to be examined and administered without violating the rule requiring the preservation by lawyers of the confidences and secrets of a client?

Formal Opinion 324 held that, without causing a violation of D.R. 4-101 (B)(1) or E.C. 4-2 and 4-3, the board of directors of a legal services office could require staff lawyers to disclose to the board such information about their clients and cases as was reasonably necessary to determine whether the board's policies were being carried out. Procedures to preserve the anonymity of the client approved in Informal Opinion 1081 and 1287 should be followed. It should be noted, however, that the information sought must be reasonably required by the immediate governing board for a legitimate purpose and not used to restrict the office's activities, and that in many contexts a request for such information by a board may be the practical equivalent of a requirement. Hence, a legal services lawyer may not disclose confidences or secrets of a client without the knowledgeable consent of the client. To the extent this is inconsistent with Formal Opinion 324, that opinion is overruled.

4. Conclusion

Much of the difficulty with the interpretation of Formal Opinion 324 and of the informal opinions discussed above lies in a general failure to distinguish between the disciplinary rules and the ethical considerations of the Code of Professional Responsibility. For the most part, the inquiries relate to what could be "required," and thus for the most part the answers were based upon the disciplinary rules. To say, as we have sometimes done, that a particular restriction upon the staff of a legal services office is not forbidden by the disciplinary rules is not to say that such a restriction is wise or is consistent with applicable ethical considerations. See E.C. 2-25, quoted above.

Viewing the problems discussed above on the aspirational level of the code's ethical considerations, we stress that all lawyers should use their best efforts to avoid the imposition of any unreasonable and unjustified restraints upon the rendition of legal services by legal services offices for the benefit of the indigent and should seek to remove such restraints where they exist. All lawyers should support all proper efforts to meet the public's need for legal services.

As modified and interpreted above, the committee's previous opinions are reaffirmed.

7. See Formal Opinion 148.

Unauthorized Practice

Background and Goals

This session, which should run between two and three hours, is intended to acquaint the paralegal with the concepts of both unauthorized and authorized practice of law. First, it should be explained that the sources of unauthorized practice rules are state law and cases interpreting that law. (This contrasts with the ABA and State Codes of Professional Responsibility which are adopted by the bar and set standards of behavior for attorneys. As yet, there is no such code governing the paralegal profession.) It should be stressed that the state of the law is uncertain. Most of the cases dealing with unauthorized practice were decided during the Depression era when attorneys were jealously guarding their economic domain. Many of these decisions are not pertinent to the modern problems of poverty law practice. It may be useful to distinguish between the various types of non-lawyer practitioners:

a) Unaffiliated laymen - this group is traditionally viewed by the bar as the most dangerous to the profession and the public. Most of the cases fall within this category.

b) Supervised paralegals - Legal Services paralegals generally fall within this group. The American

Bar Association has stated that it is permissible for an attorney to delegate tasks to non-lawyer assistants as long as they work under his direction and supervision.

c) Authorized practitioners - certain areas of law have been carved out as acceptable areas of independent paralegal practice or the authorized practice of law by non-lawyers. These include welfare cases and other administrative representation, preparation of tax returns and insurance adjustment cases.

Because of the fact that much of the existing unauthorized practice law may be obsolete, the paralegals should be told that there are few clearcut answers. The goal of the class is to raise the issues and get the paralegals thinking about them. The trainers must be careful not to unduly discourage the paralegals or overstress the negative aspects of the existing law. Emphasis should be placed on the need for the paralegals to work with their supervising attorneys to develop procedures which are acceptable under the law, but not overly restrictive.

Order to Show Cause

At the outset, the moderator should discuss the background and goals of the class and explain exactly what is going to take place. This should include a presentation of the ways in which unauthorized practice cases arise viz

misdemeanor prosecution, injunction, and order to show cause. The most common method is through an injunction. Unauthorized practice cases are often raised by a disgruntled opposing attorney who complains to the local bar association. The bar, in turn, brings an action to enjoin the paralegal's activities. It is important that the trainees be assured that, to our knowledge, no formal action has been taken against any Legal Services paralegals. The moderator should keep in mind that the purpose of the class is to raise the issues, not to scare the paralegals.

The rest of the time allotted is devoted to a discussion of an order to show cause why a paralegal should not be held in contempt for three counts of unauthorized practice.

There should be two trainers in this session besides the moderator. The moderator leads the discussion throughout. The other two trainers play the roles of representatives of the Bar Association and of the challenged paralegal in a court argument on each count of the order to show cause. The arguments should take place after the trainees have had an opportunity to raise and discuss the issues themselves on each count. During the court arguments, the moderator should play the role of presiding judge. (Often, the two representatives want to participate in the discussion. To avoid confusion, it is helpful if they stand to indicate when they are speaking as advocates and remain seated when they are speaking personally.)

The court argument format was chosen to dramatize the problems. The sessions have been considerably livelier when the trainers acting as advocates have become very dramatic and emotionally involved in the argument, as opposed to simply stating their cases point by point. The arguments also serve as a summary of the points the trainees themselves make in the discussion.

After the arguments on each count, the moderator-judge should give the trainees some idea of the state of the law on the issues raised. An effective and positive way to do this is for the moderator-judge to identify a framework within which a judge might actually decide cases like John Paralegal's. The moderator-judge can then fit the facts of the particular case into the framework. Setting out criteria that a court might apply also gives the paralegals some standards against which to assess their own actual behavior when they return to their projects. One purpose of the exercise is to illustrate how judges might decide a close case either way. In Count I of the Order to Show Cause many judges would hold that it is unauthorized practice. Yet the framework below shows how some judges might decide otherwise. Some of the criteria the judge might mention are:

1) The interests of society
   (a) federal policy to deliver legal services to the poor - Legal Services Corporation
   (b) availability of lawyers - Johnson v. Avery, 393 U.S. 483 (1969); Procunier v. Martinez, 416 U.S. 396 (1974).

(c) inability of the private bar to assume responsibility to represent the poor.

2) The posture of the case

(a) how much was at stake for the client in this situation?

(b) was the case in, or likely to result in, litigation?

(c) was the client likely to take steps which would ultimately determine a legal right?

3) Damage to client

(a) actual damage already suffered

(b) potential for damage

(c) correctness of advice given

4) Setting and expectation of client

(a) clarity of identification as paralegal

(b) law office or back fence; does it matter that the paralegal met the client in a law office? What if they met in a social setting?

5) Supervision and training

(a) presence of a lawyer-supervisor

(b) fact that paralegal has been trained.

By selecting certain of these criteria (e.g., that no lawyers available; risk to client was small; information given was correct; client knew paralegal was not a lawyer; paralegal was trained) the trainer can point out that a judge might rule in favor of a paralegal. The point to make is that case law is unclear, and that paralegals should be sensitive to

the many elements in a situation which may influence whether there is unauthorized practice.

The most important thing for the moderator to keep in mind is that the discussion must be conducted so that the trainees do not get discouraged. If handled properly, the trainees should have an understanding of the nature of unauthorized practice limitations and possible office procedures to use to avert unauthorized practice charges. The emphasis throughout should be on what paralegals can do. The trainees should gain a sense of the areas in which they should encourage their projects to formulate policies to protect clients, the paralegals and the projects. They should be aware that while no formal action has ever been taken against any Legal Services paralegals, should such action ever occur, the paralegals would receive support from their projects and organizations such as the Institute.

What follows is an outline of the argument on each count and the major substantive points which might be raised by the moderator.

Count I

Bar Association

1) The paralegal gave legal advice by telling the client that rent strikes are legal and that the client should file a complaint with the Housing Inspector. The paralegal interpreted the statute and formulated and proposed a course of action for the client. If the client followed the advice and withheld his rent, he would be placing himself in serious

jeopardy of getting evicted. By giving legal advice, the paralegal engaged in the unauthorized practice of law.

2) The setting in which this exchange took place is a Legal Services office. The client came expecting to obtain legal advice from qualified individuals who have had the requisite legal training. The public has a right to be protected from untrained, unqualified, irresponsible people who give legal advice to ignorant, unsuspecting clients.

3) In this case, the client never even saw an attorney. Ethical Consideration 3-6 dictates that a direct relationship must exist between lawyer and client. Here the paralegal dismissed the client's problem without giving him the opportunity to meet with an attorney.

Paralegal

1) There was no legal advice given in this case. The information communicated is common knowledge and well known in the community. Telling the client to file a complaint with the Housing Inspector is merely a referral. Social agencies make such referrals regularly. In addition, the paralegal did not specifically tell the client to withhold his rent.

2) Even if legal advice was given, the paralegal was acting under the supervision of a lawyer and was really conveying advice from the lawyer to the client. The paralegal had discussed this topic in depth with the supervising attorney on numerous occasions and had a manual to follow.

He is also well trained on the subject of rent withholding. The information given was correct, and no one was harmed.

3) The client in this case is poor. He had no place but Legal Services to turn. If Legal Services could not handle the case, he would go without help. For Legal Services to handle its caseload, it must use trained supervised paralegals. The Bar seems to be arguing that poor people must go without representation. The alternative, if the private Bar prevails, is that Legal Services will be glad to send all of the landlord-tenant cases to the Bar Association starting tomorrow. Under Johnson v. Avery, 393 U.S. 483, where no legal counsel is available, non-lawyers can give assistance.

Moderator

1) The basic issue raised by this count is whether or not the paralegal's statements constitute legal advice. If they do, then the paralegal has engaged in the unauthorized practice of law because giving legal advice is practicing law and only lawyers can practice law. The definition of legal advice is somewhat vague but there are certain guidelines that may be used. For example, statements which require the exercise of independent legal judgment are often legal advice. These include interpretations of statutes, regulations, and case law and application of the law to a particular fact situation. Explanation of the legal consequences of various courses of action would probably also be legal advice.

For purposes of analysis, the statements of the paralegal

in this count may be separated.

a) "Yes, under some circumstances rent withholding is legal in this state." This is probably legal advice. The paralegal is telling the client what the law of the state is. An argument could be made that the paralegal is merely repeating what is already common knowledge in the community. Furthermore, the information is correct and the client was not damaged. However, the setting in which the statement was made is important. If it were said on the back porch it probably would not be legal advice, but the fact that the exchange took place in a Legal Services office makes a difference.

b) "What you should do is go down to the Housing Inspector and make a complaint." It could be argued that this statement is merely a referral to the appropriate agency rather than legal advice. However, even if it is a referral, it is important that the client be instructed to get back in touch with the Legal Services office. Otherwise, the paralegal might be considered to have made a legal judgment concerning the nature of the client's case and what that client should do. By sending the client away without making provision for future communication, the paralegal is essentially advising him that his case cannot be handled by the Legal Services office. This determination could be viewed as a kind of "negative" legal advice.

2) Even if it is decided that the paralegal's statements constitute legal advice, there are several other factors that should be taken into account before assuming that the unauthorized practice of law has occurred. One of the most important of these is supervision. Clearly, if the paralegal consulted his supervising attorney on every individual case, there would be no unauthorized practice. The paralegal would simply be the transmitter of the information. The question, which is basically unanswered by the existing law, is whether anything short of total supervision is sufficient. For example, the supervising attorney may have given the paralegal explicit verbal instructions about what to do when a client has a particular type of problem. Or, the attorney may have prepared a manual to which the paralegal can refer. Another possibility is that the paralegal has received extensive training about how to deal with certain kinds of problems and may actually know more on the subject than the supervising attorney.

There are no clearcut answers to the questions raised by these hypotheticals. Training and supervision may prove to be important factors if and when such cases arise. In the meantime, it is essential that the paralegals and their supervising attorneys work out a system of consultation which protects all concerned: attorneys, paralegals, and clients.

3) Finally, the fact that this exchange occurred in the context of a Legal Services office is also important. In

many cases, poor clients will receive no service at all if Legal Services does not help. And in order for Legal Services offices to begin to deal with their caseload, paralegals must be used. In Johnson v. Avery, the Supreme Court ruled that in prisons where no other legal counsel is available, inmate paralegals may be used. This same reasoning may be applied to the poverty law area. Future cases may hold that Legal Services paralegals may give legal advice to poverty clients since no other lawyers will take their cases.

Count II

Bar Association

1) Advising clients as to entitlement to welfare benefits and representing them at fair hearings constitutes the practice of law. These activities involve interpretation of statutes and regulations and exercise of independent legal judgment. As such, they may only be performed by attorneys.

2) The definition of what constitutes the practice of law is a matter of state law. Even if federal regulations allow paralegals to represent clients in welfare cases, the states still have the final word, and may bar paralegals from these activities if they see fit. The federal regulations are permissive only, not mandatory, and states may require higher standards.

3) Poor people who are on welfare are entitled to be protected from unqualified, untrained non-professionals. It is the duty of the bar to insure that all people, no matter

what their economic status, are protected from such individuals.

Paralegal

1) Federal law and regulations allow clients to be represented by paralegals at welfare hearings. 45 C.F.R. §§205.10(a)(iii) and (a)(13). It stands to reason, therefore, that paralegals may also counsel clients at stages prior to the hearing, such as informing a client of possible benefits and offering assistance in the application process. Federal regulations similarly provide for non-lawyer representation in the application process. 45 C.F.R. §206.10. Indeed, the welfare department itself uses non-lawyers to perform these functions. The doctrine of preemption dictates that federal law takes precedence over state law in matters such as these.

2) Again, the bar is basically arguing that welfare clients be denied the right to counsel. The private bar will not accept welfare clients yet it advocates that Legal Services paralegals should not be allowed to do so either. This violates the very basic requirements of constitutional due process.

Moderator

1) Federal regulations passed pursuant to the Administrative Procedure Act and the Social Security Act allow laymen to represent clients at fair hearings. The Supreme Court decided in Sperry v. State of Florida ex rel. The Florida Bar, 373 U.S. 379, that federal regulations allowing paralegals to practice before the Patent Office preempt state laws

to the contrary. Thus, such practice is the authorized practice of law by a non-lawye .

Sperry, however, deals with representation before a federal agency. Welfare representation, while before state agencies, is also governed by federal regulations. Where a state agency, governed solely by state law, provides for paralegal representation, it may be overruled by a contrary decision of the state courts. This was the case in West Virginia State Bar et al, v. Earley, 109 S.E. 2d 240, 144 W. Va. 505, where the West Virginia State Supreme Court decided that it alone had the power to govern the practice of law.

2) Even though the federal regulations allow paralegals to represent clients in the application process and at fair hearings, the paralegal in this count did other things that should be examined. He assisted the client in filling out welfare application forms. As a general rule, there is no problem as long as the paralegal merely transcribes the thoughts and words of the client. In the welfare situation, the paralegal may go further and actually interpret the forms and advise the client concerning their completion. Since paralegals are explicitly permitted to represent clients in the application process and at hearings, it stands to reason that they should be allowed to perform other functions preliminary to the actual hearing. This same argument applies to the paralegal's assertion that the client is entitled to welfare benefits. While there may not be any unauthorized

practice problems with such a statement, nevertheless it is unwise to build up the client's expectations by flatly stating that s/he is entitled to benefits. The paralegal in this count should have made it clear that he was expressing his opinion and that the final determination would be made by the welfare department.

Count III

Bar Association

1) The paralegal in this instance allowed clients who came to the Legal Services office to believe that they were dealing with a qualified attorney when actually they were dealing with a mere layman. This is a serious misrepresentation from which the public must be protected in the future. The bar takes seriously its responsibility to see to it that clients are advised only by members of the bar, not by untrained, unqualified individuals.

2) Negotiating with an insurance adjuster and drafting legal documents clearly are activities which constitute the practice of law. This is particularly true in the area of negotiation, where the bargaining situation requires the negotiator to make decisions which may seriously affect the client's legal position. For a paralegal to engage in such activities is to place the client's future in the hands of an unauthorized practitioner.

Paralegal

1) All concerned agree that the paralegal in this count made a serious error by not identifying himself as a paralegal. However, this incident is the only time that such a lapse occurred. He has been severely reprimanded by his project and his supervising attorney has guaranteed that it will never happen again.

2) The negotiations performed by the paralegal in this case were done under the direct supervision of an attorney. The paralegal acted only as the agent of the attorney, whose approval, as well as the client's, was required before any agreements were undertaken.

3) All documents drafted by the paralegal were also subject to the supervision and approval of an attorney. Before signing any documents, the paralegal's supervising attorney carefully reviewed them. All pleadings and documents prepared by an attorney's employees become the product of the attorney upon his signing them. Thus, the paralegal's work became the attorney's work, and there could be no unauthorized practice involved.

Moderator

1) Under all circumstances, the paralegals absolutely must identify themselves as such. When dealing with clients, paralegals should also be careful to explain what a paralegal is in order to avoid confusion and false assumptions on the part of clients.

2) Negotiation, carried out under the direct supervision of an attorney, in which every agreement is subject to the approval of the attorney and, of course, the client, is probably not the unauthorized practice of law. However, other factors bear on this question, particularly the context in which the negotiation takes place. For example, where a legal document such as a will is involved or where there is litigation pending or already underway, the question of negotiation becomes somewhat more difficult. In such situations, the negotiator may be required to make judgments about legal questions which can have serious ramifications for the client. In such cases, it is probably safer for the attorney to handle the negotiation.

3) Paralegals acting under attorney supervision may draft documents. When the lawyer reviews and signs the documents, they become his or her work product and responsibility.

SUPERIOR COURT OF THE STATE OF INDEPENDENCE

IN THE MATTER OF)
JOHN PARALEGAL)

No. 5681-75

ORDER

Upon consideration of the verified complaint of the Jefferson County Bar Association it is hereby ordered that the Respondent, John Paralegal, appear before the undersigned Judge of this Court at 10 a.m. on April 1, 1975, to show cause why he should not be adjudged and held in contempt for allegedly committing the following acts:

Count I

It is alleged that on August 25, 1974, while employed at Jefferson County Legal Services Project, Respondent John Paralegal did meet with Samuel Peabody. Peabody said to him, "My toilet overflows and my landlord won't fix it. Can I withhold my rent until he does?" Paralegal told him, "Yes, under certain circumstances rent withholding is legal in this state. What you should do is to go down to the Housing Inspector and make a complaint." No attorney-at-law met Peabody or discussed his case with Paralegal. It is alleged that said acts and omissions constitute the unauthorized practice of law and are contempts of this Court.

Count II

On July 5, 1974, it is alleged that Respondent John Paralegal did tell Ida Mae Smith that she was entitled to welfare benefits, assisted in filling out welfare application forms and did represent Ida Mae Smith at a fair hearing before the State Department of Welfare. It is alleged that such acts are the unauthorized practice of law and are contempts of this Court.

Count III

It is alleged that since January 12, 1975, Respondent John Paralegal, while employed at the Jefferson County Legal Services Project, did meet with clients and failed to tell them he was not a lawyer. It is further alleged that he has negotiated on behalf of clients with insurance adjusters and that he has drafted pleadings and other legal documents. Said acts constitute the unauthorized practice of law and are contempts of this Court.

IF IS FURTHER ORDERED that a representative of the Jefferson County Bar Association be and hereby is appointed to prosecute this action.

Oliver Wright
Oliver Wright
Judge

Teaching Tips for Paralegal Training

The staff of the National Paralegal Institute has trained over 175 paralegals in intensive five to seven day training sessions. These sessions are designed to be delivered in a particular way, and require special techniques of the trainers. In training other trainers to teach our materials, we regularly find that they want advice from us on the manner in which they should conduct the training sessions. This list of suggestions is compiled in response to such requests.

A. Before the training begins

1. Study a list of students and try to be familiar with their names and backgrounds. Students have told us that being addressed by name by the trainers convinces them that the trainers have an interest in them, and increases their commitment to the training. Institute trainers almost always operate on a first name basis.

2. Be familiar with the content and purpose of every session in the training program. No single session ought to be taught in isolation, and the sessions should flow from and build upon one another. Effective teaching of Institute training programs requires a thorough understanding of the entire program.

3. Before your class, fully outline the points you

expect to teach. While you may cover a number of details, outline a few main goals. A class of one hour which successfully teaches three or four concepts is doing well. In your outline, build in devices for inducing class participation. (See below.)

4. Personally insure the presence and adequacy of any blackboard or visual aid which you need. To the extent that it may be useful for the trainees, draw up summaries, outlines or lists to distribute for them to use in class.

5. Visit your classroom before the class to be sure that it is properly organized. The classroom should have circular seating with a substantial writing surface. Often you will find that arrangements made by others for the classroom layout are wholly unsatisfactory and you should correct this beforehand.

6. If you are co-teaching a class, divide the subjects carefully and specifically. It is not enough to jointly agree to cover certain materials. The principal responsibility for covering each subject ought to be agreed upon. You should be familiar with what your co-teacher will be covering. If there are any disagreements with your co-teacher, either substantive or procedural, these should be ironed out before the class begins. Contradictions during a class may be disruptive and confusing. This is not to say that differing approaches should not be pointed out to trainees.

7. Be in the classroom and ready to go a little before the time scheduled for commencement. Begin at the scheduled time even if everyone is not present.

B. Format for training

1. You should not only start on time but close your class on time. Exact promptness by the trainers will communicate a sense of professionalism to the trainees. A lack of precision can throw the entire training program off schedule.

2. Always begin by summarizing each session for the trainees. Explain the purpose, content, and agenda for the session. Also explain how the particular session fits into the entire program.

3. Hold to your agenda and move on to the next subject when necessary. It is more important to complete the agenda than to allow free discussions to continue on a single point.

4. Plan your opening few minutes carefully. Where possible, begin the teaching of each session with some provocative or dramatic way of involving the paralegals and attracting their attention.

C. Getting participation of the students

1. Try to get class participation early in the session. Do not engage in lengthy lecturing.

2. In inviting participation, avoid the implication that there is a right answer or that the paralegals are being challenged or tested. Do not frame questions using language

such as "how many?" or what is the rule?".

3. Invite participation by such questions as "does anyone have an idea?" or "how might you handle this?" or "what experience have you had?". This form of questioning is not threatening, and does not imply there is a correct answer.

4. No matter what the quality of the individual's participation, do not criticize it, but find some way to be supportive and encouraging.

5. One way to encourage participation is to avoid seizing the floor and illuminating everyone's comments. One bad habit of some trainers is to constantly comment on, correct, or improve the contributions of trainees. Participation does not need to result in any "right" answers; it is a learning process in itself.

6. Make an effort to draw out quiet students only as far as they are comfortable in participating. Try to prevent one or two students from dominating a session.

D. Some teaching techniques

1. Use hypothetical problems which can be placed on a blackboard, distributed in writing, illustrated on video tape, or acted out by a trainer. The problems can provoke discussion and analysis, and are an effective way of engaging paralegals.

2. Dramatize or act out concepts. For example, in a

discussion on unauthorized practice of law, you might dramatize a court proceeding against a paralegal in which arguments are presented by the prosecutor and the defense.

3. Act out in a solo performance how a job should be done, rather than merely talk about it. For example, in explaining how a paralegal might deal with a hostile witness, the trainer may act out the approach to a house, conversation at the door and behavior once entry to the house is gained.

4. Make use of short questionnaires to find out what people know and/or to reinforce what they have learned. These must be used sparingly, and care must be taken that they are not threatening. Preferrably they are completed anonymously and people correct their own papers. The principal purpose of the questionnaire must be as a teaching device to show people what they do and do not know, thus opening them to learning.

5. Use open role play in the class sessions by inviting students to illustrate a point by acting it out. For example, in a discussion of how a paralegal should make an opening statement at a hearing, invite paralegals to stand and demonstrate the kind of statements they would make.

6. To explain a complicated or confusing document, let a few of the trainees read portions out loud and come up with interpretations.

E. Handling yourself as a trainer

1. Keep your vocabulary simple. We have never had a paralegal who appeared unable to grasp new concepts. However, we have seen a number of trainers unable to grasp the fact that intelligent people are not necessarily familiar with certain terminology. Keep in mind that confusing or unclear terms can cause the listener to completely lose the thread of a discussion. It is a common fault of lawyers in particular to assume that people understand such things as "tortious conduct," or "burden of proof." Before you use such phrases, try to explain them (in the examples given you would probably decide to avoid them). The teacher should always be conscious of the need to discuss concepts and ideas in plain language, but without talking down to the class. It is the mark of a good teacher that he or she is at all times in tune with the students' understanding of every word and concept used.

It is often helpful when working with legal documents to simply define possibly unclear terms as they come up. For example, "an affiant is simply someone who swears that a statement that is in an affidavit is true." Write difficult words on the blackboard.

2. Proceed through your subject slowly and step by step. It is a temptation for teachers to be brilliant or flashy, and to throw off glittering ideas. This is showmanship rather than teaching. Teaching is hard in that it requires you to think through the mental process of the student in coming to an understanding of a new concept. Do not assume

that the paralegals, no matter how clever or experienced, can jump over any of the steps of the process of understanding.

For example, in training paralegals to do administrative representation, you will wish to discuss the submission of evidence. Before plunging into that subject, it will be necessary to define for them what evidence is. Until they understand the varieties of forms of evidence--verbal testimony, hearsay evidence, documentary evidence--they cannot rationally analyze the form of presentation at a hearing. They must also understand that assertions by a client's representative at the hearing are not evidence unless based on personal knowledge.

Be sure that all students understand each step of the process before moving on to the next. For example, in teaching legal research, you may lead the class to discover a regulation in the Code of Federal Regulations. The exercise is useless unless all students understand why they are using CFR, and what it is.

3. Recognize the students' areas of knowledge or lack of knowledge. Get to know the students' prior experience, so that you do not end up, for example, explaining rent and rent withholding concepts to a group of paralegals who have already handled landlord-tenant cases. On the other hand, beware of assuming that paralegals understand such a simple concept as "interview." When you refer to an "interview," do you mean intake eligibility, or a complete case preparation interview? Do not use the concept one way unless you are

sure that the paralegals have the same understanding of it.

4. Be lively. Teaching is a skill, and it demands that the teacher capture and maintain interest. The teacher's whole demeanor will influence the class. A teacher who sits still and appears bored, distracted, or unexcited by the subject will communicate all those things to students. You should consider standing, moving around, and varying the pace of your delivery. Be brisk, and communicate a sense of excitement and challenge. These are, of course, matters of personal style. Some people have the capacity to communicate enthusiasm or conviction with no theatrics. Be aware, however, that a frozen or stolid presentation can be deadening, and try to break out of such a pattern. If you sense interest is flagging, do not be afraid to introduce physical movement as a change of pace.

Extreme nervousness or discomfort with the subject matter will also influence the class. Know your subject well before you begin. But don't be afraid to say "I don't know," if you don't know an answer.

5. Set simple teaching goals of what should be learned in a session. If you try to teach too much in a session, you will end up communicating little. A successful session of one hour can probably instill three fundamental concepts. Think through what these concepts are, and gear your teaching to achieve them. Drive them home and satisfy yourself that they have been learned and understood. If concepts are effectively taught step by step, and if every student is to

understand them, a few concepts are all that can be successfully taught.

6. Do not over-dominate the class. The teacher is responsible for the flow of subject matter, to be sure that the goals of the session are achieved. However, one bad habit of some teachers is to seize upon, interrupt, or extend every point made by a student. Student participation is important, not for its correctness or completeness, but because it engages the students personally and intellectually. Moreover, a good teacher is willing to allow ideas different from his or hers to emerge and be discussed. It is deadening for a teacher to try to control every thought put out. Use ideas proposed by students to generate new ideas. Naturally, incorrect observations must be corrected, but only in a way which makes the speaker feel that a contribution was made by the comment.

7. Avoid war stories. Often an experienced practitioner will utilize personal experiences to make points. This is seldom effective teaching, and at its worst deteriorates into anecdotes and self-laudatory explanations of obscure points. If you want to illustrate a concept, you are much better off framing a carefully constructed hypothetical which the students can respond to and discuss. One defect in reciting personal experiences is that no one can respond to them. They belong to the teller.

8. At the end of the session, leave enough time for a brief summary of the concepts covered. It may also be useful to repeat the session's purpose and how it relates to what the trainees will be doing next.